

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ALASKA STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

BERNARD McHUGH,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1, at Juneau.

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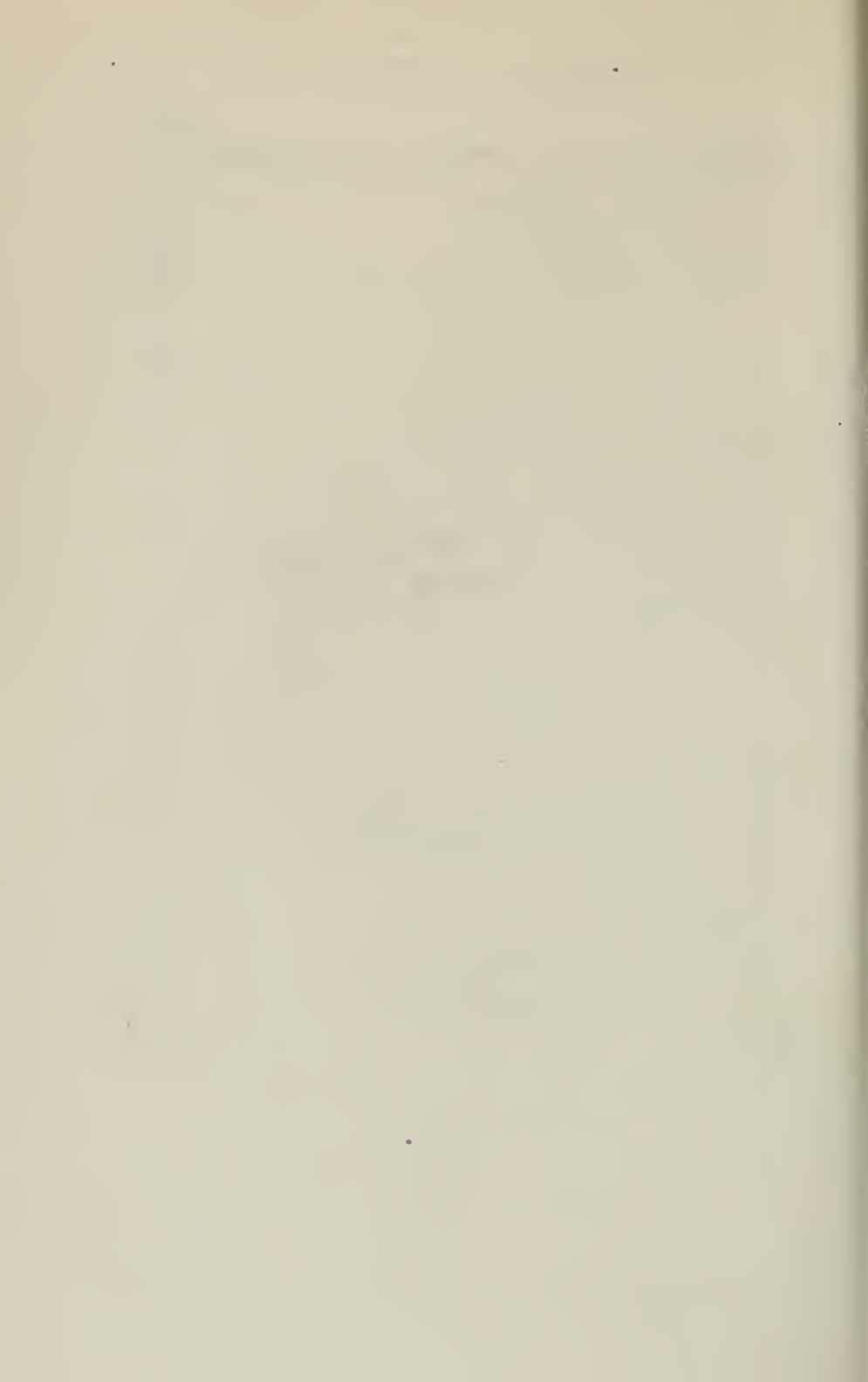
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

R. E. ROBERTSON, Esq., Juneau, Alaska, and
A. H. ZIEGLER, Esq., Ketchikan, Alaska,
Attorneys for Plaintiff in Error.

WICKERSHAM & KEHOE, Juneau, Alaska,
Attorneys for Defendant in Error.

In the District Court for the Territory of Alaska,
Division Number One at Juneau.

No. 2212-A.

BERNARD McHUGH,

Plaintiff,

vs.

THE ALASKA STEAMSHIP COMPANY, a
Corporation,

Defendant.

Complaint.

Comes now into court the above-named plaintiff and complains of the defendant and for his complaint and cause of action against said defendant says:

I.

That at all the times mentioned in this complaint and for a long time prior thereto the defendant was, and at all time since the injury complained of herein, has been and now is a corporation organized and existing under the laws of the State of Nevada, and was at all such times, and now is, engaged in busi-

ness as a common carrier of freight in the coast-wise carrying trade in the waters of Alaska, and within the jurisdiction of this Court.

II.

That on the 8th day of March, 1922, at Ketchikan, Alaska, and within the jurisdiction of this Court, this plaintiff was employed by the defendant as a stevedore in assisting defendant's other employees unload coal from the steamship "LaTouche," which said steamship was then owned and being operated by the said defendant; that in the course of his said employment this plaintiff was ordered by the defendant to and was engaged by it in shoveling coal in the hold of said steamship into a certain bucket then in the hold of said vessel, and furnished by the defendant for that purpose, and in pulling said bucket on the floor of said hold to the point thereon where it could be filled by the plaintiff and the other employees of the defendant in the said hold; that said iron bucket was a [1*] large and heavy appliance and required the united effort of three men to so pull it to the point where it could be so filled with coal; and was so constructed with a large and heavy handle held in place by an iron trigger; and was then so worn and in an unsafe and dangerous condition from long wear and hard usage as to be, and it was, a dangerous and unsafe appliance for such work, all of which was well known to the defendant; and while this plaintiff with two other employees of the defendant at said time and place were so engaged in pulling the said large iron

*Page-number appearing at foot of page of original certified Transcript of Record.

bucket on the floor of said hold to the point needed for loading, the said defective and worn trigger thereon became and was loosed and caused the heavy iron handle of the said heavy iron bucket to loosen and fall, and the said heavy iron handle did, without any fault or negligence of the plaintiff, become loose and did fall upon this plaintiff's foot, and did strike plaintiff's foot on and across the instep thereof, and did break and crush the bones and tendons, muscles and flesh of the said foot, and crippling this plaintiff for life; that this plaintiff was thereby so injured in his said foot and in his health and nervous system, that he was thereafter in the hospital under medical treatment for many weeks, and suffered and now suffers great pain, and was ever since, and now is, unable to walk or work at his labor as a stevedore, or to do any work of any kind; and plaintiff thereby suffered great pain and a permanent injury to his said foot and general health; and was thereby compelled to suspend all his labors and thereby suffered the loss of wages from said March 8th, 1922, to the date of this complaint, and will not be able to work for months yet to come, and is crippled and injured therein and thereby permanently in said foot; that plaintiff was so injured in the sum of Ten Thousand Dollars.

[2]

III.

That the defendant well knew that said appliance by which this plaintiff was injured was unsafe and dangerous, but wilfully and negligently, omitted and refused to keep it in a state of repair or replace

it with a safe and proper appliance, and thereby caused the injury to this plaintiff as aforesaid.

IV.

That this plaintiff has no knowledge or means of finding out the condition of said iron bucket and the parts thereof, as aforesaid; that the light in said hold was dim, and this plaintiff could not see the same plainly, and was then, and now is, a common laboring man without knowledge of the mechanism of the said bucket or its said parts, and was, by reason of his inexperience and the darkness, unable to discover the defects in the said appliances; that it was then the duty of the defendant to furnish this plaintiff a safe and proper bucket and appliances for use in said work; but defendant negligently and carelessly failed and refused to so furnish such safe and proper bucket and appliance for such work, or a well-lighted place to work in, whereby because of the negligence and carelessness of the defendant this plaintiff was so injured and crippled, and was so made to suffer great bodily pains and anguish, and was so injured in a permanent way, and caused to be and remain in the hospital and in his room, and rendered unable to work for a long time, whereby he so lost his wages and paid large sums for support, all to the plaintiff's damage in the said sum of Ten Thousand Dollars.

V.

That at the time of the said injury as aforesaid, and prior thereto, this plaintiff was a strong, healthy and vigorous laboring man of the age of 38 years, capable of and was earning six and one-half dollars

per day, and had long engaged in said work and labor at first-class wages, but on account of such injury plaintiff's earning capacity [3] was wholly destroyed for the period from the date of said injury to the date of signing this complaint, and was permanently reduced by one-half or more for life, all to this plaintiff's injury in the said sum of Ten Thousand Dollars.

WHEREFORE plaintiff prays for judgment against the defendant in the sum of Ten Thousand (\$10,000.00) Dollars and for his costs and disbursements incurred herein.

WICKERSHAM & KEHOE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,
Ketchikan Precinct,—ss.

Bernard McHugh, being first duly sworn, deposes and says: I am the plaintiff named in the within and foregoing complaint; I have read the same and know well the contents thereof, and the same is true as I verily believe.

BERNARD McHUGH,
Plaintiff.

Subscribed and sworn to before me this 26 day of July, 1922.

[Notary Seal]

ALFRED E. MALTBY,
Notary Public for Alaska.

My commission expires Feby. 19, 1925.

Filed in the District Court, District of Alaska, First Division. Aug. 2, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [4]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 2212-A.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Amended Answer.

Comes now defendant and, for answer to the complaint herein, admits, denies and alleges:

I.

Defendant admits paragraph I of the complaint.

II.

Defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the steamship "La-Touche," which vessel was then owned and being operated by defendant; and the defendant denies each and every other allegation contained in paragraph II of said complaint.

III.

Defendant denies paragraph III of said complaint.

IV.

Defendant denies paragraph IV of said complaint.

V.

Defendant denies paragraph V of said complaint.

AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid [5] its annual corporation license tax last due to said Territory.

II.

That on or about March 8, 1922, defendant employed plaintiff together with and as a member of a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship "LaTouche" unto a dock or wharf at the port of Ketchikan, Alaska; that all of said stevedores and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal from vessels onto docks and wharves at said port, and were then and there fellow-servants of each other and of plaintiff engaged in the same common and general employment, i. e.; unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform said work, according to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean. i. e.; Tongass Narrows, in the Territory of Alaska, and

was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with coal tubs and other appliances, in safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on or about steamships similar to said vessel; that, while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the danger likely to result therefrom, voluntarily, carelessly and negligently, and while aboard said vessel, sought to and did move a certain tub, that was used to carry coal in and out of the hold of said vessel by pulling said tub backwards, instead of, as they then and there well knew was customary, proper and safe, moving said tub by pulling on the beckets with which for that purpose said tub was provided and by which said tub could [6] have been safely moved, and that said plaintiff and his said fellow-servants by their said pulling said tub did move said tub backwards and cause the handle with which said tub was provided to fall towards then and plaintiffs being so negligently pulling said tub backwards, was struck by said handle as it so fell, and that said careless, voluntary and negligent acts aforesaid of said plaintiff and of his said fellow-servants, so committed by them with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which

they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no case caused by the defendant.

AND AS A FURTHER SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory.

II.

That on or about March 8, 1922, the plaintiff, being then and there a man of full age and experienced in the unloading and discharging of coal and freight from vessels onto docks and wharves at the port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such work and of work on and about steamships while unloading and discharging coal, was employed by defendant together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the defendant's steamship "La-Touche" at said port; that said vessel was then and there lying in the tidal and navigable waters [7]

of the North Pacific Ocean, i. e., Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter, while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub, with which plaintiff was then and there thoroughly conversant and with which he had then and theretofore been doing said work without any complaint or objection to its condition, although he was then and there entirely familiar with such appliances and with the method of their use, and which tub was used to carry coal in and out of the hold of said vessel, by pulling said tub backwards, instead of, as he then and there well knew was customary, proper and safe, moving and assisting to move said tub by pulling on the beackets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that plaintiff by his said pulling and assisting to move said tub backwards caused, as plaintiff then and there well knew was likely to result, the handle with which said tub was pro-

vided to fall towards him, and plaintiff, being so negligently pulling said tub backwards, was struck by said handle as it was falling, and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, [8] sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by defendant.

WHEREFORE defendant prays that it may go hence without delay, and that plaintiff recover nothing by this action, and that defendant have judgment against plaintiff for its costs and disbursements herein incurred.

R. E. ROBERTSON,

A. H. ZIEGLER,

Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

C. M. Taylor, being first duly sworn on oath, deposes and says: That he is a resident of the Territory of Alaska, over the age of 21 years, and agent of the corporate defendant; that he has read the foregoing amended answer, and knows the contents thereof, and that the same is true as he

verily believes; that the reason he makes this verification is that there is no president, vice-president or other acting head of said corporate defendant now in or a resident of said territory.

C. M. TAYLOR.

Subscribed and sworn to before me this 21st day of March, 1923.

[Notarial Seal]

R. E. ROBERTSON,

Notary Public in and for Alaska.

My commission expires June 20, 1925.

Copy of the within amended answer received this 21st day of March, 1923.

J. W. KEHOE,

Of Counsel for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 22, 1923. Jno. H. Dunn, Clerk. By M. D. Morrissey, Deputy. [9]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 2212—A.

566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

**Order Directing that Reply to Original Answer
Stand as Reply to Amended Answer—Dated
March 26, 1923.**

Comes now the plaintiff and moves the Court that the reply filed herein by the plaintiff to the original answer of the defendant company in this court and cause stand as the reply to the answer, as amended, of said defendant herein,

ORDERED, that said reply be and it is hereby permitted to stand to and as the reply to the amended answer herein.

Dated this 26th day of March, 1923.

THOS. M. REED,

District Judge.

Filed in the District Court, District of Alaska, First Division. Mar. 27, 1923. John H. Dunn, Clerk. By———, Deputy.

Entered Court Journal No. D, page 375. [10]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2212—A.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Reply.

Comes now the plaintiff and for reply to the further, separate and first affirmative defense in defendant's answer herein, says:

I.

Admits the allegations in paragraph one thereof.

II.

Admits that on the 8th day of March, 1922, this plaintiff was employed by the defendant as a longshoreman in the unloading and discharging of coal from the defendant's steamship "La Touche" on to a dock or wharf at the port of Ketchikan, Alaska; admits that at that time plaintiff was of the age of 38 years; admits that said vessel was then and there lying in the tidal waters of the north Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to the said dock and wharf by lines; admits that while at said work he was injured as alleged in his complaint herein and not otherwise, and denies each and every other allegation in said paragraph contained.

And for a reply to the further, separate and second affirmative defense in said answer, this plaintiff says:

I.

Admits the allegations of paragraph one thereof.

II.

Admits that on the 8th day of March, 1922, this plaintiff was [11] employed by the defendant as a longshoreman in the unloading and dis-

charging of coal from the defendant's steamship "La Touche" on to a dock or wharf at the port of Ketchikan, Alaska; admits that plaintiff was of the age of 38 years; admits that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to the said dock and wharf by lines; admits that while at said work he was so injured as alleged in his complaint, and not otherwise, and denies each and every other allegation in said paragraph contained.

WHEREFORE plaintiff asks for judgment against the defendant as in his complaint herein prayed for.

WICKERSHAM & KEHOE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Bernard McHugh, being first duly sworn, deposes and says: I am the plaintiff named in the foregoing reply; that I have read the same, know well the contents thereof, and that the same is true.

BERNARD McHUGH,
Plaintiff.

Subscribed and sworn to before me this 22d day of November, 1922.

[Notarial Seal] JAMES WICKERSHAM,
Notary Public for Alaska.

My commission expires Sept. 15, 1925.

Service of a full, true and correct copy of the within reply is hereby acknowledged this 22d day of November, 1922.

A. H. ZIEGLER,
Of Attorneys for Defendant.

Filed in the District Court, District of Alaska,
First Division. Nov. 22, 1922. Jno. H. Dunn,
Clerk. By M. D. Morrissey, Deputy. [12]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Verdict.

We, the jury in the above-entitled cause of Bernard McHugh vs. Alaska Steamship Company, a corporation, do find a verdict in favor of the plaintiff, Bernard McHugh, and fix his damages at the sum of Four Thousand Seven Hundred and Fifty (\$4,750.00) Dollars.

FRANK W. THOMPSON,
Foreman.

Filed in the District Court, District of Alaska, First Division. Mar. 29, 1923. John H. Dunn, Clerk. By———, Deputy.

Entered Court Journal No. D, page 379. [13]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Judgment.

This action came on regularly for trial on the 26th day of March, 1923, and continued throughout the 26th, 27th, 28th and 29th of March, 1923. The plaintiff appeared in person and by his attorneys, Wickersham and Kehoe; the defendant appeared by its attorneys, R. E. Robertson and A. H. Zeigler. A jury of twelve persons was regularly empaneled and sworn to try the said case. Witnesses on the part of the plaintiff and defendant were sworn and examined.

After hearing the evidence, the arguments of counsel for both parties, and instructions of the Court, the jury, on the 29th day of March, 1923, retired to consider their verdict, and subsequently

and on said day returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff Bernard McHugh, and which verdict is as follows:

“We, the jury in the above-entitled cause of Bernard McHugh vs. Alaska Steamship Company, a corporation, do find a verdict in favor of the plaintiff, Bernard McHugh, and fix his damages at the sum of Forty-seven Hundred Fifty (\$4750.00) Dollars.

and did thereby assess the plaintiff's damages in the sum of Four Thousand Seven Hundred Fifty (\$4,750.00) Dollars.

Thereafter and on the 31st day of March, 1923, the defendant moved herein for a new trial, which motion has been fully heard and is now overruled.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff, [14] Bernard McHugh, do have and recover of and from said defendant, Alaska Steamship Company, the sum of Four Thousand Seven Hundred Fifty (\$4,750.00) Dollars, with interest thereon at the rate of Eight (8%) per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in said action, to be hereafter taxed.

Stay of execution granted for 60 days.

Judgment rendered this 4th day of April, 1923.

THOS. M. REED,
District Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 4, 1923. John H. Dunn,
Clerk. By———, Deputy.

Entered Court Journal No. D, page 394. [15]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 566-KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the defendant, the Alaska Steamship Company, a corporation, by its attorneys, and respectfully assigns in connection with its petition for writ of error, the following errors committed in the proceedings and in the trial of the above-entitled action, which it intends to urge upon the hearing hereof in the Appellate Court:

I.

The Court erred in permitting plaintiff's witness Young, on direct examination, over defendant's objections, to answer the question, "Was that a safe appliance" (referring to the bucket) "to be used at that time under those circumstances in that

work?" to which said witness answered, "I would not consider it so."

II.

The Court erred in refusing to permit plaintiff's witness Young, on cross-examination, to answer the question propounded by defendant "Do you feel as positive of that" (referring to the position of the men working on the ship) "as anything else you have said in your testimony?"

III.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to testify as to the length of the time the bucket was used after plaintiff was [16] injured, and particularly to answer the question "How long was that bucket used after Barney was hurt?" To which said witness answered "I don't know just how long after."

IV.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question, "Do you know whether that bucket dumped itself when it was being taken out at any time?" To which said witness answered "I don't remember, I can't say, because I was underneath the hatch. I can't see on deck of the hatch."

V.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question, "Do you know whether there was anything, any block of wood put

in between the handle and the bucket to hold it at any time that night?" To which said witness answered, "I never noticed."

VI.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question "Was there any change made in the bucket after Barney was hurt?" To which said witness answered, "Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets."

VII.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question "Well, I will ask him the condition of the tripper then, whether it was broken or in good shape." To which said witness answered, "I never noticed any." [17]

VIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the length of time the bucket was used after the accident, and particularly to answer the question, "How long did you work with it." To which said witness answered, "It wasn't over two hours at the most."

IX.

The Court erred in permitting plaintiff's witness

Gillis, on direct examination, over defendant's objections, to testify as to the bucket tripping after he went to work, which testimony in questions and answers is as follows:

"Q. Just explain to the jury how that happened and how soon after you went to work.

Q. How long after you went to work did that happen?

A. The first time it happened was about half an hour after.

Q. What happened at that time?

A. Why it spilled all the coal out of it.

Q. Where was it when it spilled the coal?

A. In the center of the hatch.

Q. How far up?

A. Oh, it didn't get off the ground at all.

Q. Well, was the wire cable attached to it when it spilled? A. Yes, sir.

Q. Was anybody touching it? A. No, sir.

Q. What made it trip itself off, do you know?

A. Why the catch.

Q. What was the matter with the catch?

A. Wore out is all." [18]

X.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to other occasions of the bucket tripping, and particularly to answer the question, "Did it do that again any other time that evening?" To which said witness answered, "Yes, sir."

XI.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the manner that the bucket's handle fell on a subsequent occasion, and particularly to answer the question, "Why did the handle fall that time?" To which said witness answered, "Oh, it come unhooked."

XII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question, "You may state to the jury whether or not, in your judgment, it was a safe appliance, safe appliance to be used for that purpose that night." To which said witness answered, "It wasn't; no; no."

XIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the usual methods of handling coal in buckets, and particularly to answer the question, "Mr. Gillis, I wish you would tell the jury what is the usual method of longshoremen handling coal in buckets, as you were that night, follow in pulling a bucket back when it comes down to be loaded. Is there any particular way of doing it?" To which said witness answered, "Yes, sir." And in answer to the further question, "Just state if there is any usual custom or how do you do it when the bucket comes down. What do you do with

it?" To which the said witness answered, "There is generally a couple of lugs fastened on it." [19]

XIV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance for handling coal, and particularly to answer the question, "Now, from your examination of that bucket that night, and from the actions that you saw it performing, was it or was it not a safe appliance for handling coal," and, "Well, then, I will renew my question as to whether or not this bucket that night, as it was being used by Barney and these other people at that time was a safe appliance?" To which said witness answered respectively "It was not" and, "No, sir, it was not a safe appliance."

XV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to testify as to the manner another man was hurt after plaintiff's accident, and particularly to answer the question, "How was he hurt?" To which the witness answered, "The same was as Barney, only I think the bail took him further up on the leg. They got this man out of the hold and I seen him a couple of days afterwards. He was limping around, and I have seen him since." To which answer, upon defendant's motion, the Court ruled, "All that latter part may be stricken."

XVI.

The Court erred in permitting plaintiff's witness

Klemm, on direct examination, over defendant's objections, to testify as to his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question, "Mr. Klemm, from your experience as a dumper of these buckets and from your examination of that particular bucket that night, I will ask you as to whether or [20] not it was a safe appliance to be used in that class of work?" To which said witness answered, "Well, I wouldn't say so," and, "I wouldn't say it was safe because there was no way of holding that, because there was no way of holding that, because, for illustration, I think it was the first or second bucket that came out of the hold—you hoist the bucket out and give it a kind of a swing you know. The winch driver did. You know, he wasn't kind of careful enough; or kind of jerked it a little bit and the bucket was going back and forth enough to throw that little tripper up and it tripped. The bucket dumped itself before it ever got out to me."

XVII.

The Court erred in permitting plaintiff's witness Klemm, on direct examination, over defendant's objections, to answer the question, "Was there any ropes on it, or anything?" To which said witness answered, "I don't know," and, "Well, I didn't notice any ropes on it. They may have been on there, or they may not. I never used them. I would just take hold of the edge of the bucket."

XVIII.

The Court erred in permitting plaintiff in his own behalf, on direct examination, over defendant's ob-

jections, to testify as to his receiving and why he had to receive contributions or charity from other people, and particularly to answer the question, "Will you state to the jury then, Mr. McHugh, why you have had to receive contributions or charity from other people?" To which said plaintiff answered, "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital I had only \$28.00 of my own and the money I received afterwards of course I had to borrow [21] it; that I must have in order to live."

XIX.

The Court erred in permitting plaintiff's witness Mustard, on direct examination, over defendant's objections, to answer the question, "Well, can you say then whether or not the stiffness will not remain?" To which said witness answered, "There are all sorts of possibilities, but I would not say that it might not disappear, that it might not remain, but I should expect it to disappear."

XX.

The Court erred in denying defendant's motion for nonsuit at the close of plaintiff's case in chief.

XXI.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "What was the purpose of having the picture taken?"

XXII.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "All right. Doctor, you state that you had a picture taken at that time."

XXIII.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "State whether or not that was easily apparent or"

XXIV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?" [22]

XXV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question, "Well, Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?"

XXVI.

The Court erred in not promptly or at all instructing the jury, at defendant's request, to disregard the statement made by plaintiff's counsel in the presence of the jury during the direct examination of plaintiff's witness Gillis, on rebuttal, that, "We offer to show by this witness and by Barney

McHugh also, who has appeared as a witness, that at that time and place they were talking with this man and he was talking generally to the people around him and that he announced publicly that he was an I. W. W., and that it was the only union and the best union, and then began a general denunciation of the Government of the United States and its officers. We offer to prove that by these two witnesses."

XXVII.

The Court erred in permitting plaintiff's witness Mustard, on direct examination on rebuttal, over defendant's objections, to answer the question, "My question is as to the condition and appearance of his foot at the time he first examined it, about the 15th of May, 1922—the outside appearance of the foot." To which said witness answered, "The foot was discolored somewhat and considerable swollen the first time I saw it."

XXVIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination on rebuttal to answer the question, "Was any instructions given to you at that time, or at any time on that boat by Mr. Pollow, the mate, or by any other officer or any other person on the boat, in regard to the manner of handling these buckets?" [23] To which said witness answered, "No, sir."

XXIX.

The Court erred in receiving in evidence, over defendant's objections, defendant's original answer

in the case, which is Plaintiff's Exhibit No. —
and which in words and figures is as follows:

"In the District Court for the District of Alaska,
Division Number One at Juneau.

No. 2212-A.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Plaintiff's Exhibit No —.

ANSWER.

Comes now defendant and, for answer to the
complaint herein, admits, denies and alleges:

I.

Defendant admits paragraph I of the complaint.

II.

Defendant admits that on or about the 8th day
of March, 1922, at Ketchikan, Alaska, plaintiff was
employed by defendant as a stevedore or longshore-
man in unloading coal from the steamship "La-
Touche," which vessel was then owned and being
operated by defendant; and the defendant denies
each and every other allegation contained in para-
graph II of said complaint.

III.

Defendant denies paragraph III of said com-
plaint.

IV.

Defendant denies paragraph IV of said complaint.

V.

Defendant denies paragraph V of said complaint.

AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws [24] of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory.

II.

That on or about March 8, 1922, defendant employed plaintiff together with and as a member of a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship "LaTouche" on to a dock or wharf at the Port of Ketchikan, Alaska; that all of said stevedores and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal from vessels on to docks and wharves at said port, and were then and there fellow-servants of each other and of plaintiff and engaged in the same common and general employment, i. e., unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform such work, according

to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.; Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out in to said waters, and was then and there fully equipped with coal tubs and other appliances, in safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that, while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the danger likely to result therefrom, voluntarily, carelessly and negligently and while aboard said vessel sought to and did move a certain tub, that was used to carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as they then and there well knew was customary, proper and safe, moving said tub forward by pulling on the becketts with which for that purpose said tub was provided and by which said tub could have been safely moved, and that said plaintiff and his said fellow-servants by their said shoving on said tub forced the body of said tub forward and caused the handle with which said tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward

under the forward impetus so given to the body of said tub by the said negligent shoving of plaintiff and his said fellow-servants; and that said careless, voluntary and negligent acts aforesaid of said plaintiff and of his said fellow-servants, so committed by them with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by the defendant.

AND AS A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the [25] business of common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax due to said territory.

II.

That on or about March 8, 1922, the plaintiff, being then and there a man of full age and experienced in the unloading and discharging of coal and freight from vessels on to docks and wharves at the Port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such

work and of work on and about steamships while unloading and discharging coal, was employed by defendant together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the defendant's steamship "LaTouche" at said port; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.; Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub, with which plaintiff was then and there thoroughly conversant and with which he had then and theretofore been doing said work without any complaint or objection to its condition, although he was then and there entirely familiar with such appliances and with the methods of their use, and which tub was used to carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as he then and there well knew was customary, proper and safe, moving and assisting to

move said tub by pulling on the beekets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that plaintiff by his said shoving and assisting to shove said tub forward from the rear caused, as plaintiff then and there well knew was likely to result, the handle with which tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward under the forward impetus so given to the body of said tub by the said negligent shoving and assistance in shoving of plaintiff; and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had assumed said risks and dangers and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by defendant.

WHEREFORE defendant prays that it may go hence without day, and that plaintiff recover nothing by this action, and that defendant have judgment against plaintiff for its costs and disbursements herein incurred.

(Signed) A. H. ZIEGLER,

(Signed) R. E. ROBERTSON,

Attorneys for Defendant. [26]

United States of America,
Territory of Alaska,—ss.

Willis E. Nowell, being first duly sworn on oath, deposes and says: That he is a resident of the Territory of Alaska, over the age of 21 years, and agent of the corporation defendant; that he has read the foregoing answer, and knows the contents thereof, and that the same is true as he verily believes; that the reason he makes this verification is that there is no president, vice-president or other acting head of said corporate defendant now in or resident of said territory.

(Signed) WILLIS E. NOWELL.

Subscribed and sworn to before me this 27th day of October, 1922.

(Signed) R. E. ROBERTSON,
Notary Public for Alaska.

My commission expires June 20, 1925."

Copy of the within answer received this 27th day of October, 1922.

WICKERSHAM & KEHOE,
Of Counsel for Plaintiff.
XXX.

The Court erred in denying defendant's motion for a directed verdict for the defendant herein at the close of the evidence.

XXXI.

The Court erred in not promptly instructing the jury and in failing to promptly strike from the records, at defendant's request, the statement made

by plaintiff's counsel in his argument on rebuttal to the jury that; "Now, both attorneys talked about Barney's drinking and being on a spree, and they said that this damage to his foot might have been produced that way. Well, it might have been produced in a thousand different ways. But it wasn't! Doctor Mustard swore to you men positively—and there was nobody brought here to question him. They didn't even ask Doctor Story about it—Doctor Mustard swore positively that that foot was injured at the same time that the other two bones were broken by that big, iron nub which struck the bone, sunk in and broke it and bruised the foot."

XXXII.

The Court erred in failing and refusing to give defendant's requested instruction No. 1, as follows:
[27]

I instruct you that in law the plaintiff is not without fault, if it appears from the evidence that by the exercise of any care and caution which was, under the circumstances, reasonable, practicable and available, he might have avoided the injury charged.

XXXIII.

The Court erred in failing and refusing to give defendant's requested instruction No. 2, as follows:

"I instruct you that it is the duty of an employee to exercise ordinary and reasonable care in the protection of himself in the performance of his work; and if he does not do so, and his want of care contributes in any degree, however slight, to any injury to himself, then he is

guilty of contributory negligence, and cannot recover damages from his employer, even though the employer were negligent. If you find, from a preponderance of the evidence, that the plaintiff McHugh, in his work about, or in pulling on the rear rim of, the coal tub in the manner that he did, and that his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant, Alaska Steamship Company."

XXXIV.

The Court erred in failing and refusing to give defendant's requested instruction No. 3, as follows:

"I instruct you that contributory negligence is the want of ordinary care on the part of the party injured; that is to say, it is not the want of such care as an unusually prudent person would take, but the want of such care as an ordinarily prudent person would exercise under the same or similar circumstances, which, either by itself or concurring with the negligence of the defendant, if any, proximately causes the injury."

XXXV.

The Court erred in failing and refusing to give defendant's requested instruction No. 5, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff took hold of the rear rim of the coal tub in question and pulled or shoved thereon, and that when he did so he knew that the bail of said coal tub, if it should fall, could only fall toward

the rear and not toward the front of said tub, and that he could have taken hold of said tub by the rim forward of the bail thereon, or by handles attached to the lip of the tub, or beackets attached to said handles, instead of taking hold of said tub by the rear rim thereof, and that by so doing he could have moved the tub in safety, and that he took hold of the said rear rim of said tub and pulling or shoving thereon was a dangerous way of moving said tub, and that to take hold of the rim of said tub forward of the bail or by handles or beackets attached to said handles on the lip of said tub was a safe way of moving said tub, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, in such case the jury will find for the defendant." [28]

XXXVI.

The Court erred in failing and refusing to give defendant's requested instruction No. 6, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff was directed in moving the coal tub on which he was working to move the same forward with its lip or nose in a forward position, and to so move it forward by pulling on the handles or beackets attached to said handles on the lip of said tub, if you find there were any such handles or beackets, or by taking hold of said tub forward of the bail, and you further find that such was a safe way to move said tub, and

that it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, moved said tub either by pulling or shoving on the rear rim, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and in such case you should find for the defendant."

XXXVII.

The Court erred in failing and refusing to give defendant's requested instruction No. 7, as follows:

"I instruct you that if you believe that plaintiff was injured by reason of the bail of the coal tub falling against or upon his foot, and if you find that the condition of said tub including the bail thereof and the trigger or catch, was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, confronting him in the use of said tub and if you find from a preponderance of the evidence that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in undertaking to do the work at which he was engaged that would or should ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was working pursuant to instructions of the defendant, if you should so find."

XXXVIII.

The Court erred in failing and refusing to give defendant's requested instruction No. 8, as follows:

"I instruct you that if you find that the plaintiff was injured by reason of the bail of the coal tub in question falling upon or against him, and if you find from a preponderance of the evidence that the condition and manner in which said bail was operated and held in place and released was open and obvious to plaintiff, and if you find from a preponderance of the evidence that plaintiff was of sufficient intelligence to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then the plaintiff cannot recover anything in this case, even if the defendant company was at fault and negligent in allowing said coal tub to be used by the plaintiff or in permitting the trigger or catch on the [29] bail thereof to be out of order, if you find by the preponderance of the evidence that such is the fact and in such case you will render your verdict for the defendant."

XXXIX.

The Court erred in failing and refusing to give defendant's requested instruction No. 10, as follows:

"I instruct you further that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to

remedy the defect; and in the event that the master does so promise, the servant may, by relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and if you believe in this case that the tub with which the plaintiff was working, that the trigger or catch holding the bail in place thereon was defective, and that the defendant company promised to remedy the same but failed to do so within a reasonable time after such promise, and that McHugh continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event, I instruct you that McHugh assumed the additional risk of the defect, if any, in said tub, and you will return a verdict for the defendant."

XL.

The Court erred in failing and refusing to give defendant's requested instruction No. 12, as follows:

"You are instructed that if McHugh engaged with the Alaska Steamship Company in the work of unloading or assisting to unload coal

from the steamship 'LaTouche' without at the time fully understanding or comprehending the dangers incident to such work, yet if you find that between the time of his employment and the time he was injured he learned of those dangers, if any, or in the course of his employment he ought to have known of the liability to accident by being hit by the bail of the coal tub if the same should fall, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the Alaska Steamship Company."

XLI.

The Court erred in failing and refusing to give defendant's requested instruction No. 16, as follows:

"You are instructed that the Alaska Steamship Company is [30] not responsible for the negligence of McHugh's fellow-servants, if the jury believes from the evidence that plaintiff's fellowservants were guilty of negligence, and that such negligence caused the accident by which plaintiff claims to have been injured. The term "fellow-servants" as used in these instructions means those who were engaged with the plaintiff in the same work, without any relation to each other, except as co-laborer, and without rank."

XLII.

The Court erred in failing and refusing to give defendant's requested instruction No. 17, as follows:

"You are instructed in this case that if you

find from the preponderance of the evidence that the injury which McHugh claims to have suffered was caused by the negligence of his fellow servants, that is, if his fellow servants so negligently handled, moved, pulled or shoved the coal tub with or about which McHugh was working, so as to cause the bail or handle thereof to fall and strike McHugh and to cause said injury, then your verdict should be for the defendant."

XLIII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 1, as follows:

"I instruct you that negligence is defined as being the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

And in this case you cannot find a verdict for the plaintiff McHugh in any amount whatsoever unless you first find by a preponderance of the evidence that the injury, if any, sustained by him and the damages, if any, incurring to him by reason thereof, were the results of negligence, as hereinbefore defined, of the defendant Alaska Steamship Company or its officers, agents, or employees, or by reason of some defect or insufficiency due to its or their negligence, as hereinbefore defined, in the

coal tub or bucket with which said plaintiff McHugh claims to have been working.

In this behalf I instruct you that the mere occurrence of the injury, or of the damage complained of, if you find by a preponderance of the evidence that the plaintiff McHugh did sustain said injury and damages, is no evidence of negligence on the part of the defendant Alaska Steamship Company or of any of its officers, agents or employees, or that the existence of a defect or insufficiency if you so find, in said coal tub or bucket was due to its or their negligence, and I further instruct you that the burden is on the plaintiff McHugh to show, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence, as hereinbefore defined, which proximately caused the injury and damage. The plaintiff McHugh has the burden of proving, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence." [31]

XLIV.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 3, as follows:

"I instruct you that the mere fact that you find from a preponderance of the evidence that the bail of the coal tub on or about which McHugh claims to have been working fell upon or came in contact with his foot and injured it as claimed by him and that he suffered damages

therefrom as contended by him, is no evidence of negligence on the part of the defendant Alaska Steamship Company or any of its officers, agents or employees or that the defect, if you find by a preponderance of the evidence that there was a defect, in said tub or bucket was due to its or their negligence, but the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company was guilty of negligence which proximately caused said, if any, injury, and said, if any, damages, that is to say, the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company or its officers, agents or employees failed to observe, for the protection of said McHugh while he was working on said vessel 'LaTouche' on March 9, 1922, that degree of care, precaution and vigilance which the circumstances in connection with said work justly demanded, and that by reason thereof said McHugh suffered said injury and damages."

XLV.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 4, as follows:

"I instruct you that in this case even though you should find the defendant Alaska Steamship Company guilty of negligence from a preponderance of the evidence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been per-

manently injured for the reason that there is no evidence in this case that said McHugh has been permanently injured."

XLVI.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 5, as follows:

"I instruct you that in this case even though you should find from a preponderance of the evidence the defendant Alaska Steamship Company guilty of negligence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been permanently incapacitated for the reason that there is no evidence in this case that said McHugh has been permanently incapacitated in his earning power." [32]

XLVII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 6, as follows:

"I instruct you that you cannot find the defendant Alaska Steamship Company guilty of negligence in this case unless you find from a preponderance of the evidence that it had knowledge of the defect, if any, in the coal tub or bucket being used by McHugh or that it should have, in the exercise of ordinary care, acquired such knowledge. I instruct you that it is a rule of law that the master is not usually liable for latent defects, nor is he liable for defects arising so short a time prior to the accident, if any,

as not to have been discovered by him in the course of his reasonable inspections. In this case the Alaska Steamship Company is known as the 'master,' and the plaintiff McHugh is known as the 'servant.' "

XLVIII.

The Court erred in giving its certain instruction numbered 7, which is as follows:

"You are instructed that the defendant, the Alaska Steamship Company, admits in its answer in this case that the plaintiff herein was one of its employees engaged by it in unloading and discharging coal out of its steamship, the 'LaTouche,' on to the dock or wharf at Ketchikan, Alaska, on March 8, 1922, and also on that day and at all times since that day the said Alaska Steamship Company, defendant herein, was and now is a common carrier engaged in trade and commerce in the Territory of Alaska."

XLIX.

The Court erred in giving its certain instruction numbered 8, which is as follows:

"You are instructed that every common-carrier engaged in trade or commerce in the Territory of Alaska, shall be and is liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, appliances and machinery; and you are also instructed that in all actions brought against any common carrier to recover damages for personal injuries to an employee, the fact that the

employee may have been guilty of contributory negligence shall not bar a recovery by the employee where his contributory negligence was slight and that of the employer was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

L.

The Court erred in giving its certain instruction numbered 9, which is as follows: [33]

"You are further instructed that in this case the defendant the Alaska Steamship Company, is liable to the plaintiff for all damages which may have resulted to him from the negligence of the defendant or by reason of any defect or insufficiency due to its negligence in its appliance, machinery, ways or works, causing the injury to his person, if any, so alleged to have been received by him on March 8, 1922, while so employed by the defendant in unloading and discharging coal from defendant's steamship, the 'LaTouche,' onto the wharf or dock at Ketchikan, Alaska."

LI.

The Court erred in giving its certain instruction numbered 10, which is as follows:

"If you should find from the evidence, however, that the plaintiff was guilty of any contributory negligence in causing the injury complained of, you are hereby instructed that such contributory negligence shall not bar a recovery

by him in this case, where his contributory negligence was slight and that of the defendant was gross in comparison. If you should find that the plaintiff was guilty of contributory negligence at the time of the alleged injury, it would then be your duty to determine from the evidence in the case whether his contributory negligence was slight in comparison with that of the defendant, and to diminish the damages, if any, to be allowed to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and of the defendant, and to return a verdict accordingly."

LII.

The Court erred in giving its certain instruction numbered 11, which is as follows:

"You are instructed that no person shall recover damages from a common-carrier under the laws in force in Alaska for personal injury to himself, where the injury was done by his own consent, or was caused by his own negligence, without any negligence on the part of the defendant; but where the plaintiff and defendant are both at fault, the plaintiff may still recover, provided he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee."

LIII.

The Court erred in giving its certain instruction numbered 14, which is as follows:

“The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you shall find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit is brought provides that such contributory negligence is not to defeat a recovery altogether, but that the damages [34] shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.”

XIV.

The Court erred in giving its certain instruction numbered 15, which is as follows:

“The statute under which this suit is brought makes the defendant liable to the plaintiff for all injuries suffered by the plaintiff because of its negligence, or that of any of its officers, agents or other employees. Therefore, as a matter of law, the negligence of any officer, agent or employee of the defendant, other than

the negligence of the plaintiff himself, is the negligence of the defendant, for which it would be liable.”

LV.

The Court erred in giving its certain instruction numbered 16, which is as follows:

“The plaintiff in this case alleges that the injury he suffered, if any, was caused by the negligence of the defendant in failing to furnish a safe and well-lighted place for him to work in, and safe appliances and equipment with which to work, whereby, he was injured.

On this branch of the case, the Court instructs you that an employer does not guarantee the absolute safety of the place where the employee works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employee to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant or employee does not undertake to incur the risk arising from the negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendant and its officers, agents and employees in charge of the work on the steamship ‘LaTouche’ at the time of the injury to plaintiff, resulting from the employment of the plaintiff as a

laborer in such work, to exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find by a fair preponderance of the evidence that the plaintiff was so injured on the defendant's steamship 'LaTouche' on March 8, 1922, while so unloading and discharging coal therefrom, and that the place where he was required to work was dark and badly lighted, and that the condition of the light prevented the plaintiff from discovering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff." [35]

LVI.

The Court erred in giving its certain instruction numbered 17, which is as follows:

"The Court further instructs the jury that it was the duty of the defendant steamship company, its officers, agents and employees having charge of the work in which plaintiff was engaged when he was injured, to furnish to the plaintiff who was in his employ, such tools, appliances, tubs and other instrumentalities as were reasonably safe for the purpose for which they were used, and the Court instructs the jury that if they believe from a fair preponderance of the evidence in this case, that the defendant steamship company or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which

it knew to be defective, or which its officers, agents, or employees whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence the defendant or its officers, agents or employees superintending said work might have known to be defective and liable to drop the handle of the said iron bucket when so being used in said work, and that in consequence of said defect the plaintiff, while exercising ordinary care, was injured while in the performance of his duties, then the jury should find a verdict for the plaintiff."

LVII.

The Court erred in giving its certain instruction numbered 19, which is as follows:

"One of the defenses in this case is that the plaintiff being of full age and experienced in the work of unloading and discharging coal from a steamship unto a wharf or dock at Ketchikan, Alaska, assumed the risks of the employment and cannot recover for that reason.

On that branch of the case the jury are instructed that the plaintiff assumed only the risks of the injury which were ordinarily incident to the employment in which he was engaged; and you are further instructed in this connection, that by the use of the expression "a risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on

the part of a steamship company operating as a common carrier, or its employees, this is not a risk ordinarily incident to the employment; and if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment.

LVIII.

The Court erred in giving its certain instruction numbered 20½, which is as follows:

“There is this difference between the defense of [36] contributory negligence and that of assumption of risk. Contributory negligence is the omission of the employee to use those precautions for his own safety which ordinary prudence requires; while assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master’s employ without objection, he takes upon himself the risk of injury from such defects.

The jury, in the case of defense of contributory negligence, should compare the negligence of the parties, if any shown, and such defense is not a bar to plaintiff’s recovery, where his contributory negligence was slight and that of the

employer was gross in comparison, but the damages should be diminished by the jury in proportion to the amount of the employee's negligence.

If the jury, on the other hand, find that the plaintiff assumed the risk of his employment under the instruction I have given you, then such finding would be a bar to plaintiff's recovery and your verdict should be for the defendant."

LVIX.

The Court erred in giving its certain instruction numbered 21, which is as follows:

"The jury is instructed that if you shall find a verdict for the plaintiff in this case, it will be your duty to assess the damages which he has sustained, not to exceed the sum of Ten Thousand Dollars demanded in his complaint. The damages, if any, in this case, cannot be exemplary; that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint, also the condition of his health and physical ability to labor, before the accident complained of, as compared with the present condition thereof and how far the injury is probably permanent in its character and results, as well as the mental and physical suffering he has suffered, if any, by reason of the injury;

and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint."

LX.

The Court erred in receiving and filing herein the verdict of the jury in favor of the plaintiff and against the defendant.

LXI.

The Court erred in entering judgment herein in favor of the plaintiff and against the defendant, which said judgment was entered herein on April 4, 1923, in favor of the plaintiff and against the defendant, for the sum of \$4,750.00.

R. E. ROBERTSON,
A. H. ZIEGLER,
Attorneys for Defendant.

Filed in the District Court Territory of Alaska,
First Division. Jun. 1, 1923. John H. Dunn,
Clerk. By ———, Deputy. [37]

In the District Court for the District of Alaska,
Division Number One at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpo-
ration,

Defendant.

Petition for Writ of Error.

Comes now the Alaska Steamship Company, a corporation, the above-named defendant, and complains that in the records and proceedings had in the District Court for Alaska, Division Number One, in Case No. 566—KA, Bernard McHugh, Plaintiff, vs. Alaska Steamship Company, a Corporation, Defendant, and also in the rendition of the judgment in said cause in said District Court against said Alaska Steamship Company, a Corporation, in the sum of \$4,750.00 on April 4, 1923, together with interest thereon and costs, manifest error hath happened to the great damage of the said Alaska Steamship Company, a corporation, as will more fully appear from the assignment of errors filed herewith, and respectfully prays that a writ of error may be issued herein, and for an order fixing the amount of the bond in said cause, and for such other orders and processes as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1923.

R. E. ROBERTSON & A. H. ZIEGLER,
Attorneys for the Alaska Steamship Company.

Filed in the District Court, Territory of Alaska,
First Division. Jun. 1, 1923. John H. Dunn,
Clerk. By ———, Deputy. [38]

In the District Court for the District of Alaska,
Division Number One at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpo-
ration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, the Alaska Steamship Company, a Corpora-
tion, as Principal, and the United States Fidelity &
Guaranty Company, a Corporation, as Surety,
hereby acknowledge ourselves to be indebted and
firmly bound to pay to Bernard McHugh the sum
of Six Thousand Dollars (\$6,000.00) good and law-
ful money of the United States, for the payment of
which sum, well and truly to be made, we hereby
bind ourselves, our and *and* each of our successors
and assigns, jointly and severally, firmly by these
presents.

Sealed with our seals and dated the 1st day of June, 1923.

The condition of this obligation is such, however, that whereas the above bounden Alaska Steamship Company, a corporation, has sued out a writ of error in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered, made and entered in said cause on the 4th day of April, 1923, wherein and whereby it is ordered, adjudged and decreed that Bernard McHugh, the above-named plaintiff, have and recover from the said Alaska Steamship Company, the above-named defendant, the sum of \$4,750.00, with interest thereon at the rate of eight per cent per annum from said date, together with his costs and disbursements,

NOW THEREFORE, if the said Alaska Steamship Company, a corporation, shall prosecute its said writ of error to effect, and [39] shall answer for and pay all such damages and costs as may be awarded against it, if it fail to make its plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

ALASKA STEAMSHIP COMPANY, a
Corporation,

By R. E. ROBERTSON,

Its Attorney,

Principal.

[Seal Surety Co.]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Corporation.

By R. E. ROBERTSON,

Its Attorney in Fact and General Agent,

Surety.

Acknowledged before me this 1st day of June, 1923.

[Notary Seal]

A. H. ZIEGLER,

Notary Public for Alaska.

My commission expires July 15, 1925.

Approved as to form and sufficiency of surety, this the 1st day of June, 1923, and it is hereby ordered that said bond shall operate as a supersedeas from the filing hereof.

THOS. M. REED,

District Judge.

Filed in the District Court, Territory of Alaska, First Division. June 1, 1923. John H. Dunn, Clerk. By ———, Deputy. [40]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court for the District of Alaska, Division Number One, GREETING:

Because in the record and proceedings and by the verdict of the jury, as also in the rendition of a judgment of a plea in said District Court, which is before you, wherein Bernard McHugh is plaintiff, and Alaska Steamship Company, a corporation, is defendant, a manifest error hath happened to the great prejudice and damage of the said Alaska Steamship Company, a corporation, as by its petition doth appear.

We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, DO COMMAND YOU, if judgment be therein given, that then under your seal distinctly and openly, you send the records and proceedings aforesaid, with all things pertaining thereto, to the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, so that you have the same before said Court on or before thirty (30) days from the date of this writ, so that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, what of right, and

according to the laws [41] and customs of the United States ought to be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, and the Seal of the District Court of the District of Alaska, Division Number One, affixed at Ketchikan, Alaska, this 1st day of June, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

The foregoing writ allowed this the 1st day of June, 1923.

THOS. M. REED,
District Judge.

Copy of the foregoing writ of Error received and due service admitted, this 1st day of June, 1923.

WICKERSHAM & KEHOE,
Of Counsel for Plaintiff (Defendant in Error).

Filed in the District Court, Territory of Alaska.
First Division. Jun. 1, 1923. John H. Dunn,
Clerk. By———, Deputy. [42]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to Bernard McHugh, and to Messrs. Wickersham and Kehoe, his Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this Citation, pursuant to a Writ of Error filed and lodged in the Clerk's office of the District Court for the District of Alaska, Division Number One, in that certain cause wherein you, the said Bernard McHugh, are plaintiff (and defendant in error), and the Alaska Steamship Company, a corporation, is defendant (plaintiff in error), then and there to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 1st day of June, 1923.

[Seal]

THOS. M. REED,

District Judge.

Attest:

JOHN H. DUNN,

Clerk of the District Court.

Due service and receipt of copy of the foregoing citation admitted this 1st day of June, 1923.

WICKERSHAM & KEHOE,
Of Counsel for Plaintiff (and Defendant in Error).

Filed in the District Court, Territory of Alaska, First Division. June 1, 1923. John H. Dunn, Clerk. By———, Deputy. [43]

In the District Court for the District of Alaska, Division Number One, at Ketchikan, Alaska.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on duly and regularly to be tried at Ketchikan, Alaska, on Monday, the 26th day of March, 1923, before the Honorable Thomas F. Reed, Judge of said Court, and a jury having been empaneled, thereupon the following proceedings were had and done, to wit: [44]

Testimony of John G. Young, for Plaintiff.

JOHN G. YOUNG, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. Young, state your name, will you, to the jury?

A. John G. Young.

Q. How old are you?

A. I'll be forty in September.

Q. How long have you resided in Alaska?

A. Why, since— My last residence in Alaska, for this period, would run back to 1915.

Q. Are you a married man? A. Yes, sir.

Q. Where does your family reside?

A. Here in Ketchikan.

Q. What is your business, Mr. Young?

A. I'm following electrical work.

Q. What do you mean by that?

A. Why, I am at present working as a lineman with the light and power company.

Q. Here in Ketchikan? A. In Ketchikan.

Q. Have you ever done any work on the wharf assisting in unloading coal?

A. Yes, sir.

Q. When?

A. Not since this particular time. It was a year ago.

(Testimony of John G. Young.)

Q. Do you know McHugh, the plaintiff in this case? [45]

A. Yes, I have got acquainted with him lately.

Q. Did you know him at that time that you mentioned, of your working on the wharf?

A. No, I didn't know him then.

Q. Do you remember working down there, unloading coal, about the eighth or ninth of March, 1922?

A. Yes.

Q. What steamship were you unloading from?

A. Well, my recollection is that it was the "La-Touche."

Q. And when was it you assisted in unloading this coal?

A. Well, during the—I started in about noon-time and worked till midnight.

Q. On the eighth of March?

A. Well, I guess it was that day; yes.

Q. You started in at noon and worked till midnight?

A. About one o'clock; and we had an intermission for lunch, or supper, at six o'clock.

Q. Yes.

A. Started in again at seven and worked till midnight.

Q. What part of the work did you do?

A. Why, I was dumping the buckets on top of the hopper as they came from the boat.

Q. The buckets were loaded with what?

A. With coal.

(Testimony of John G. Young.)

Q. From where did they get this coal?

A. Why, out of the hatch.

Q. Out of the hatch of the "Latouche"?

A. Yes, out of the hatch of the "Latouche."

Q. How was it brought up to you, Mr. Young?

[46]

A. Passed up by the winch in these tubs that they used.

Q. How many tubs were being used that night—that afternoon and night?

A. Why, we started in with three tubs to break down the hatch. The coal was piled up level with the main deck of the boat. I don't know whether it is the main deck or not, but it is the top deck of the boat.

Q. Yes.

A. And the coal was loaded up level with that, and they took the covers off and unloaded down to the next solid planking or deck, or whatever they had, underneath.

Q. How many buckets did you say they were using?

A. We started with three buckets.

Q. Did you use three buckets all afternoon and all evening until twelve o'clock?

A. No; there was a period when we only used two buckets.

Q. Yes.

A. When they first started to break it down the space was rather small, for one thing, and they dumped in and only used two buckets.

(Testimony of John G. Young.)

Q. How long did that last?

A. I really couldn't tell.

Q. But they afterwards used three?

A. Later on in the shift we went back and went to using three buckets again.

Q. How many men, if you know, were working in the hold on those buckets?

A. There were three men to each bucket.

Q. Three men to each bucket. There were nine men, then, in the [47] hold?

A. Yes.

Q. Do you know whether Mr. McHugh was one of those men or not?

A. Well, really, I don't recall the man at all, because he was— The crew, you see, worked until six o'clock; so it was night-time when he came on shift; but I could see figures down there in the hold, but after a man has been working in coal for a little while, you couldn't distinguish whether he was a white man or a nigger.

Q. Well, you had charge of the dumping of these buckets up at the hopper?

A. Yes.

Q. And what became of the coal when you dumped it in the hopper?

A. Why, there is a little dump-car that dumps out of the sides and they would run that in on a little track and as you trip the bucket, the coal slides down this chute and fills the car, and then the two men, or probably three men—I am not sure,

(Testimony of John G. Young.)

—but they took them out anyway, pulled the car back and dumped it into the bunkers.

Q. Now, did you notice anything the matter with any of those buckets that afternoon and evening?

A. Yes; there was with one of the buckets.

Q. Well, tell the jury, what, if any, difference there was between that and the other buckets?

A. Why, this bucket— As I said just now, we started in with three buckets and we had pretty good luck with the two first ones, I think, and the next bucket dumped; so—they were working right in the square of the hatch, you see, and being [48] that this bucket dumped the way it did, why, we threw it to one side, after, I believe, it had dumped twice. We threw that bucket to one side and then they worked along with the two buckets that didn't dump after we tried them out.

Q. Who instructed that it be laid aside?

A. Well, I don't know. I guess I shouted as much about it as anybody.

Q. Do you know whether there was a mate there, belonging to the boat that had charge of the men?

A. I expect there was.

Mr. ROBERTSON.—That is quite leading.

Mr. WICKERSHAM.—Yes.

Mr. ROBERTSON.—Leading all along that way with an intelligent witness.

The WITNESS.—Pardon?

Mr. ROBERTSON.—I'm objecting to the testimony.

(Testimony of John G. Young.)

The COURT.—It may be a little leading, but I think it is simply preliminary.

Q. Do you know who the mate was?

A. No; just that there was a man there with gold braid on his cap. That is, so far as I was concerned there, I figured he was the mate. If he walked up and down and assumed the position of ordering you around, you would figure he had authority. I wouldn't do it.

Q. Where was he employed?

A. I expect he would be working on that boat.

Q. Do you know that he was?

A. I presume so.

Q. Well, did he give orders?

A. I expect so; yes; he did to me. [49]

Q. Who caused the bucket to be laid aside? You say you made a complaint about it?

A. Yes; I did.

Q. Well, who laid the bucket aside?

A. I really couldn't tell you. I think they just ran it to one side and left it there.

Q. Was the mate around there, do you know?

A. At that instant, I couldn't tell you.

Q. Well, how many times did the bucket dump itself that afternoon before you laid it aside?

A. Twice anyway.

Q. Well, now, was it put on later to work?

A. It was later on in the night.

Q. Later on in the night. What time? Do you know?

A. No; I think after—

(Testimony of John G. Young.)

Q. (Interrupting.) Wasn't it on at six o'clock when you began to work again, or seven?

A. It must have been put on before six o'clock.

Q. Yes.

A. Some time late in the afternoon the bucket was put back to work because they had opened up enough room for the men to be able to work in reasonably— You know, you could kind of hide a little bit from the treacherous bucket going out.

Q. Now, what happened to the bucket? What was the matter with it?

A. Why the catch on the side was faulty. You couldn't hold the thing. A little bit of a jar would unlatch it and the thing would dump. The way the buckets are built—

Q. (Interrupting.) Just tell this jury, now, as nearly as you [50] can what would cause the bucket to unlatch.

A. Why, a little jar would cause this hickey to come through in the bail. It would just kick that little catch loose. It only needs to raise the catch about an inch. That is the margin of safety. If the catch raises an inch, why the bucket will dump.

Q. You say that the bucket dumped how many times that afternoon?

A. Well, I am quite sure that the first bucket that came over the ship was dumped into the bay.

Q. How many more times that afternoon?

A. After this interval, Judge, I wouldn't attempt to state how many times the bucket dumped.

(Testimony of John G. Young.)

Q. Did you notice the latch or the trigger on that bucket to see whether it was in shape?

A. Why, yes; it was perfectly apparent to me why the bucket dumped. I could see it, because the bucket dumped right alongside of me the first time it did dump.

Q. Tell the jury why that bucket dumped.

A. Well, to my recollection, the tide was quite low and the boom—the way the length of the boom was, they had to haul their lead just as high as they could to get the bucket up enough to clear the edge of the hopper, and this first bucket being that it was the first trip with a load—we tested it once with an empty bucket to see if I had centered the boom right and that was all right, apparently. You could handle an empty bucket without any trouble, but when you had three quarters of a ton of coal or so in the bucket, it was quite an effort, then, to hold it with a line that was [51] slack enough so as to clear the edge of the hopper where I was standing, and he didn't judge the distance right and it struck the hopper and the bucket unlatched and she dumped right there, partly into the bay and partly on the dock.

Q. Now, let me find out where you stood. Tell the jury just where you were working.

A. Well, I got a little platform at the top side of the hopper that's about, oh, probably that wide (showing) to stand on, with a little rail probably as high as the desk (indicating) from the floor.

Q. Behind you?

(Testimony of John G. Young.)

A. No; it would be alongside of me in my work. Of course, at times in my work, it would be behind me.

Q. Now, how high were you up from the dock when you stood there by that hopper?

A. Probably 22, 23—might have been 25 feet.

Q. Above the deck of the vessel?

A. At the beginning of the unloading period, we would be a good deal higher than that, because of the low tide and the deck of the vessel, of course, would be way down below the dock.

Q. Was that an old bucket or a new bucket?

A. Well, it had seen service.

Q. What was broken about it?

A. Why, on this latch device on the bucket, there is a bit of a handle that you can tie on and make fast to the side of the bucket and this hanging handle is where it was broken off in this case.

Q. Was that why it dumped?

A. Well, the fact that the handle wasn't there you couldn't [52] make it fast and you couldn't prevent it from dumping with the latch unhooked.

Q. Well, now, just tell the jury what you mean by dumping?

A. Well, it causes the bucket to turn almost upside down.

Q. And spill the coal out.

A. And the coal would spill out.

Q. What caused it to do that?

A. Well, the latch unfastening would certainly cause it to dump.

(Testimony of John G. Young.)

Q. Was it unfastened by somebody or did it accidentally unfasten itself? How about that?

A. This time that I speak of, the first load, I am sure it dumped as the result of striking the hopper that I was standing on.

Q. Yes.

A. It hit it with a good, sound smack and this little latch just flew off and the coal dumped.

Q. Now, there were two other buckets being used?

A. Yes.

Q. Did either of them at any time dump themselves? A. I don't think so.

Q. This was the only bucket that dumped itself?

A. I am quite sure.

Q. And it dumped because it was broken?

Mr. ZIEGLER.—Just a moment. That is leading, if the Court please.

The COURT.—Yes.

Mr. WICKERSHAM.—Yes.

The COURT.—Objection sustained. State the reason. [53]

Q. State the reason why it dumped.

A. I don't see any reason. The bucket dumped because of the latch. There wasn't anything to keep it from not dumping.

Q. I will ask you this: If a bucket that is used in the way those three buckets were used, upon which the latch is broken as it was broken upon that bucket and which therefore had a tendency to dump itself, is a safe appliance to be used in that kind of work?

Mr. ROBERTSON.—Now, wait. I think the

(Testimony of John G. Young.)

witness first ought to be qualified as to his experience on a question of that kind.

The COURT.—Yes; objection sustained.

Q. How much work of that kind have you done?

A. Some years ago I worked for several months during three winters.

Q. You were hoisting coal and hoisting other materials out of boats?

A. I never acted as hoistman in this country. I have dumped quite a few hundred tons of coal, though, I think.

Q. What kind of buckets did you work with?

A. Buckets of this type—round buckets.

Q. How much experience have you had in that kind of work?

A. Why it would probably total up a year and a half of work of that kind.

Mr. WICKERSHAM.—Well, then, Ill renew my question, as to whether, under those circumstances, this was a safe appliance to be used in this kind of work.

Mr. ROBERTSON.—That calls for a conclusion of the witness also.

Mr. ZIEGLER.—Question for the jury to say from the facts [54] produced.

The COURT.—Well, he can give his opinion. I think he has qualified as an expert. Simply a matter of opinion. He may answer.

Q. Was that a safe appliance to be used at that time under those circumstances in that work?

A. I would not consider it so.

(Testimony of John G. Young.)

Q. No. You went to work, you say, at twelve o'clock noon or night? A. No; at noontime.

Q. You went to work at noon. How late did you work? A. Until midnight that night.

Q. What kind of weather was it, especially that night?

A. Well, during the day and night it was very mean weather, raining and turning to snow—blustery, miserable day altogether.

Q. What kind of light did you have up where you were at work?

A. Well, when we needed a lamp or light, I could call for an electric light and I got— They didn't have any extension cords that they could give me electric light, so I had a lantern—an ordinary coal oil lantern.

Q. Just a single coal oil lantern. Where was it hung?

A. It was hung on a piece of wood that was—oh, I don't know—a two by four probably. It was nailed on to the end of the building up there.

Q. What lights were below you on the boat, that you could see?

A. Just the lights in the hatch for the men at work.

Q. How dark was it between you and the hatch?

A. Well, where I was standing it was dark; that is, after it became dark. [55]

Q. Yes.

A. Where I was standing and looking over into the side of the ship, the glare of the light in the

(Testimony of John G. Young.)

hatch was such that I couldn't distinguish the deck or objects on it very plainly.

Q. Could you see the winchman?

A. At odd times I could see him; yes. If there was a break of steam went by that would reflect some of the light from the hatch. The steam from the winches would go past him and I would get a little reflection that way, and at times I would just get a glimpse of him.

Q. Well, in general, was it light or dark or unusual? A. Quite dark, I would say.

Q. During that evening, after dinnertime, what effort did you make to secure better arrangements on these buckets, for handling, if any?

A. I didn't make any after dinner. I made a kick for them when I first started to work.

Q. Just tell the jury what you did?

A. Why, these buckets with a handle on them, this trip apparatus—I don't know whether the jurymen are familiar with it or not; it's so familiar to me that I can hardly figure that a man doesn't know all about it.

Q. Go right ahead and tell what you know about it.

A. There is a handle hangs down from this latch proper and there is a hole punched in it so you can fasten a short lanyard; so you can lash this thing fast to get away from this possibility of a bucket dumping and when I started to work there, they sent these buckets up and they had no lanyards [56] on them and, as I say, this bucket dumped

(Testimony of John G. Young.)

and the way it dumped I took a look at it and saw it wasn't lashed. There was no lanyards there; so I called for lanyards and somebody on the boat—who I don't know—didn't know what this lanyard was for or why a lanyard was wanted. Maybe I didn't use the right word, but I thought the word was allright there and I used it, but eventually I got two or three little pieces of rope and they sent them up to me, and I threw them back down on board the boat and told them to make them fast where they belonged, which they did. They tied these on to two of these buckets. The other bucket they couldn't tie the rope on to because there wasn't anything to tie on to. So we had two buckets with lanyards on them and the practice was to tie this lanyard on a little nub of iron that sticks out of the side of the bucket and then when it would come back to me, I would untie it and dump the bucket and tie it up again; and that was the way I was working.

Q. What was the purpose of having that lanyard on there and having it tied?

A. As I said before, to keep the bucket from dumping.

Q. If that lanyard was on there and tied, would the bucket dump itself?

A. It would have to jump through the hoop to do it. If the thing was tied on there, it couldn't get away.

Q. On this third bucket, there was no lanyard?

A. There was no way of fastening a lanyard to it

(Testimony of John G. Young.)

because this (indicating) "hiekey" business that hung down there was missing.

Q. Did you notice whether it was broken off or not? A. It looked to me like it got wrenched off. [57]

Q. Did you notice any effort made to fasten the trigger on this bad bucket at any time with a wooden block or rope or anything?

A. No; I didn't see any wooden block used on that bucket at any time or on any of the buckets. We used a rope and made two of them fast and the other one we trusted to glory, I guess.

Q. How large is one of these buckets? Just stand up and tell the jury about how high it is and how wide and the length of it.

A. Well, I would say that the buckets are as follows: deep as that desk (pointing) and probably that deep (indicating) to where my feet are—

Q. Yes.

A. And from the back of the bucket to the dumping lid would be a good span like that (showing)—

Q. Yes. A. Or less.

Q. And the width of it?

A. Well, then, the width of it would be in the neighborhood of that desk. I never measured one of them. I just have it in my mind's eye. Then there are different sizes of them, but this particular bucket that we're talking about, they were about that size—I should say that they were about that wide (showing).

Q. What were they constructed of, Mr. Young?

(Testimony of John G. Young.)

A. Why, they're made out of pretty heavy sheet iron and they were reinforced on the corners and around the dumping lip, and so forth, to make them as stiff and worthy as they can be. [58]

Q. Do they sit flat on the deck?

A. No; they sit on three rollers.

Q. Where are those rollers?

A. Possibly four rollers. I think there were three rollers on them. Why, there's two rollers on the front of the dump lip at the bottom and one at the back on the bottom.

Q. How are those rollers constructed—so the bucket could be whirled around on the rollers?

A. No; they were riveted fast in their housings.

Q. Which way did the rollers permit the bucket to be slid or rolled?

A. Well, they— Let's say the lip of the bucket is to you. That lip of the bucket could be rolled, or the whole bucket could be rolled in your direction or towards me.

Q. It could roll either backward or forward on those rollers? A. Yes; calling it that way.

Q. How much do you think one of those buckets would weigh?

Mr. ROBERTSON.—Is that just a guess or an estimate?

Mr. WICKERSHAM.—An estimate.

A. I should estimate that they would weigh in the neighborhood of six hundred pounds.

Q. Loaded or unloaded?

(Testimony of John G. Young.)

A. That is the empty bucket. I don't know; I never tried to lift one. I don't think I could.

Q. What sort of handle does it have on it? What sort of a bail?

A. Well, it is a big, heavy U-shaped piece of iron, with some kind of forging in the center at the top when it is up to hang the hook to to keep it from sliding, you know—to hold it in the center.
[59]

Q. How large is that bail?

A. It is probably—it is in the neighborhood of three inches wide on the top at the center and better than an inch and a quarter thick.

Q. And where is it fastened to the bucket?

A. Down near the bottom on each side.

Q. On each side. What holds the bail in place?

A. The bail is held in place by a piece of iron about a half an inch thick. It answers as a dog, so that when the bail is held perpendicularly, this dog is engaged by the latch falling over and it is held that way.

Q. What position is that bail usually in when it is ready for work?

A. When you are ready to lift the bucket?

Q. Yes. A. It is erect; perpendicular.

Q. Stands up straight? A. Yes.

Q. How do you trip the bail? How do you let it down?

A. Well, if you want to let the bail down, you operate this catch on the side and let the bail down.

(Testimony of John G. Young.)

Q. The bail, as I understand you, is hung lower than the center of the bucket. A. Oh, surely.

Q. How high does it come above the bucket?

A. The bail rises over the top of the bucket about two feet.

Q. About two feet? A. About that; yes.

Q. What is in the center of the top of that bail?
[60]

A. There is some kind of iron—I don't know whether it is forged or not, but there is a piece of iron shrunk on there, I think to hold the hook.

Q. And is arranged so that the hook goes in it?

A. Yes, sir.

Q. And then how do you raise that bucket out of the hold or let it down?

A. You have to use a winch.

Q. Well, you have a rope to go down, too?

A. Wire, with a chain on it.

Q. And what do you catch the hook with or the bail with? A. With the hook.

Q. With the hook?

A. On the end of this chain.

Q. On this chain that comes down? A. Yes.

Q. What is that chain connected to, or wire rope?

A. Well, the chain is connected to a wire cable and the wire cable to the winch.

Q. How is it raised with a winch?

A. By steam power.

Q. By steam power? A. Yes.

(Testimony of John G. Young.)

Q. How much will that handle weigh, in your judgment?

A. Well, that handle is solid metal. It is rather a hard thing. I never weighed one. I don't know what the atomic weight is or anything like that. I should say, by judging the weight of them, by just letting one of them down, it would weigh in the neighborhood of 200 pounds, if you try to lift the whole thing. [61]

Q. Now, assuming this bucket to be sitting on this floor, with its nose in this direction away from the jury, and its back this way and the handle to be up, could it be tripped, sitting there on the floor?

A. Surely.

Q. How would you do that?

A. Just release that catch.

Q. Just release the catch where—on the side of the bucket? A. On the side of the bucket.

Q. And then, the back of the bucket being to the jury, which way would the handle fall?

A. The bail can only go in that direction (showing).

Q. It can only go backwards? A. Yes.

Q. It doesn't go forward?

A. Not unless your bucket is completely busted. This dog that locks the bucket keeps the bail from going forward.

Q. How long is the half side of that bail—from the point where it is fastened to the bucket on the lower side up to the center of the bail, how far is

(Testimony of John G. Young.)

it, on that particular bucket, as near as you can judge? A. Oh, I should say over four feet.

Q. Over four feet.

A. Four feet and some inches. I don't think it would be five feet.

Q. And assuming that a bucket is sitting here on the floor and the trigger is jarred sufficiently to let it loose and there is no rope on it to hold it up, what would happen?

A. It would just naturally fall over. [62]

Q. And how much a blow would it give if it fell over?

Mr. ROBERTSON.—Oh, now, I object to that on the ground that it calls for a very expert conclusion that this witness couldn't possibly testify to unless he is qualified.

Q. Well, how heavy is that whole bail?

A. Well, as I said, I have never taken one of these bails off the bucket, but it forms a considerable proportion of the weight of the bucket. However, I should think that one of those bails would weigh in the neighborhood of 200 pounds.

Q. And it is hung on a pivot or iron pin on either side of the bucket?

A. On each side of the bucket.

Q. Below the center?

A. Down close to the ground, the bottom of the bucket.

Q. Was there any appliance on that bucket or on any of those buckets for pulling the bucket with either forward or backwards on the floor of the deck?

(Testimony of John G. Young.)

A. No, I can't recall any attachment. I have seen buckets of that type have handles on the side of them, but whether any of these particular buckets had any, I can't recall whether they had handles on them or not.

Q. Well, do you recall whether they had any ropes on them for the purpose of pulling them backwards and forwards?

A. No; there was no ropes on any of them.

Q. And, so far as you can recall, was there any handles of any kind on them?

Mr. ROBERTSON.—Now, if the Court please, I object to that. The witness has just stated that he can't recall; then he comes right back and asks him the same question in that way. [63]

The COURT.—Yes; objection sustained. Just ask him whether there were any handles.

Q. Well, was there any handle or any other appliance on that bucket that you know of for pulling it backwards and forward on the floor of the deck?

A. No; I can't recall any handles on any of the buckets, ropes or otherwise.

Q. Tell the jury how, if some men are down on the floor of the deck, in the hold of a vessel, preparing to receive the bucket, how it would come down to them.

A. I expect just lower it down to them.

Q. With this line?

A. Just lower it down with the falls.

Q. Have you ever been on the deck, in the hold

(Testimony of John G. Young.)

of a vessel, receiving buckets of that kind for the purpose of loading them? A. Yes.

Q. What is the usual custom or manner of receiving them when they come down?

Mr. ROBERTSON.—Oh, we object to this. We have been very lenient; it seems to me we have been extremely lenient in not objecting to some of these questions.

Mr. WICKERSHAM.—Oh, I merely want the jury to understand what the men do with the bucket when it comes down.

Mr. ROBERTSON.—Why don't you ask what those men did with the bucket?

The COURT.—You may ask what is the customary manner of loading, if this is for the purpose of general information to the jury so they can understand the situation.

Q. Go ahead and do that. [64]

A. Just make a wild grab for the bucket and get her alongside of the coal and get it in just as quickly as you can. That's about the a b c and the x y z of it.

Q. Does it make any difference which end of the bucket comes in first.

A. No, so long as it's right side up; that's the main thing.

Q. Do you know what a becket is?

A. I think so.

Q. What is a becket?

A. It's a little piece of iron they put in in mak-

(Testimony of John G. Young.)

ing up a tackle to protect the rope from chafing, as it were.

Q. Can you make a picture of it?

A. I don't know. I am not much of an artist.

The COURT.—What's the purpose—

Mr. WICKERSHAM.—One part of the defense is that there was a becket.

The COURT.—Is it necessary to go into that?

Mr. WICKERSHAM.—I think so.

Mr. ROBERTSON.—It seems to me that the dictionary is the best authority as to what a becket is.

The COURT.—Well, if he knows what it is, he can answer.

Q. Just come down here and draw a picture of it.

A. I expect that if you imagine a doughnut in your hand and peel off the outside half of the doughnut, so that you leave the hole and make a little hollow in there so as to allow a rope in, is about as good a description as I can give of a becket, to my understanding of it. All I know about a becket.

Q. In other words, it is a hole with a rim around it?

A. A hole with a rim around it that you can put a rope in. [65]

Q. Were there any beckets on this bucket or on any of these three buckets? A. No, sir.

Q. There were none. Now, you say there were three buckets being worked out of that hold that night? A. Yes, sir.

Q. And there were nine men in the hold and three on each bucket, you say? A. Yes.

(Testimony of John G. Young.)

Q. Is that right? A. Yes; I think there was.

Q. Now, what would be the rule of working the buckets? If three men worked with one bucket and sent it up, where would that bucket go when it comes back? A. It would go right back to them.

Q. It would come back to the same three men?

A. Yes; they haven't done anything since it left.

Q. What would the other bucket crews be doing?

A. They're busy filling their buckets.

Q. And then when their bucket came back, what would happen to it—the empty bucket?

A. The empty bucket goes back to the crew that sends it up.

Q. What would be done with one of these other buckets?

A. Whoever was next in rotation would take the hook and send the bucket up.

Q. What would be done with the bucket?

A. It would be dumped and returned to them.

Q. Where would it go when it came back?

A. Right back to the same men. [66]

Q. Right back to the same men? A. Yes.

Q. Then what would be done with that bucket?

A. The same routine would be gone through.

Q. Where would it go when it came back?

A. It would come back right to the same outfit and then they—

Q. (Interrupting.) Then the same bucket would come back to the same group of men all the time?

A. Yes, so long as that group kept working in that one place, but if—

(Testimony of John G. Young.)

Q. (Interrupting.) I see.

(Whereupon a recess was taken until 2 P. M.)

Monday, March 26, 1923.

Court met pursuant to recess.

JOHN G. YOUNG (on witness-stand).

Direct examination resumed by Mr. WICKER-SHAM.

Q. I wish you would look at this drawing on the blackboard now standing before the jury, and tell the jury what you had to do with making it.

A. Why, Mr. Kehoe drew it and I spotted the locations so that it would be a representation of what it was supposed to be.

Q. What is it supposed to represent?

A. That is as near as I could make it a representation of the tubs or buckets they used in unloading the ship.

Q. Is that a fair representation of the tub that you described to the jury this morning?

A. I claim it is pretty good.

Q. Yes. I wish you would explain to the jury, as near as you can now, what the various points of interest on that drawing are. For instance, what is this object that goes up [67] over the top of the tub?

A. This is what is known as the bail (indicating). This (indicating) wasn't long enough, so we put on a "hickey" here with a hook engaged to lift the tub.

(Testimony of John G. Young.)

Q. That would be an object, then, with a hook on it?

A. No; not with a hook, but simply an eye, but the hook would hook into it.

Q. What is this bail made of?

A. The whole thing is iron, with the exception of this fligree stuff here. That is supposed to be rope.

Q. Did you tell the jury how large that bail was, this morning?

A. Why, I gave the general dimensions of it, I think.

Q. Well, just repeat them briefly.

A. It was about four feet from this point here to the top, with a width across, I should say, better than three feet, and down on this side.

Q. It comes down on this side of the tub?

A. Yes; to correspond with this. That is why we put the shaded line there.

The COURT.—The dotted line.

Mr. WICKERSHAM.—The dotted line.

The WITNESS.—Yes.

The COURT.—Represents the under side of the bail?

The WITNESS.—Yes; this would be the under side.

Q. Now, these objects below the bucket here, what are they?

A. Now, then, we mentioned the rollers for the movement of the tub in this direction (showing) you see. We put these little rollers up here. They were solid rollers, probably four inches in diameter.

(Testimony of John G. Young.)

There are two in front and one sits [68] in the center of the back.

Q. How wide are those rollers? How long are they?

A. Three or four inches long—small wheels.

Q. They were small wheels, but they were long.

A. No; they were about—looking across the bucket this way, they were about four inches probably.

Q. Four-inch tread?

A. Yes; four inches wide; tread is about four inches.

Q. What is this object which looks like a chain?

A. We put that in there to represent the rope that I spoke of this morning. It was fastened to this latch device.

Q. Yes.

A. And this circle here represents an iron nub that sticks out in this manner so that when the bucket is dumped, this nub engages with the bail up here (indicating) and keeps the bucket from going all the way through like a wheel.

Q. This round spot here, then, is a nub or projection on the bucket?

A. Yes; it sticks out there about that far probably (showing).

Q. Now, explain to the jury what this object is here on the right-hand side of the bail?

A. Well, that is the latch that we speak of. This is what holds the bucket. When it is in this position (indicating) it holds the bucket locked and

(Testimony of John G. Young.)

when it is pulled out in this direction (showing), so that it is—I don't know, probably not so much; but the idea is, when you move it that way, you unlatch the bucket to dump it.

Q. Did you say how high that bucket was, Mr. Young? You did this morning, didn't you?

A. Yes; it would be in the neighborhood of that high (showing). [69]

Q. It would be larger than the representation on the blackboard, wouldn't it?

A. Oh, decidedly; yes.

Q. How much coal can be handled in that bucket at one time?

A. How much coal? Oh, it would probably hold eighteen or nineteen hundred, seventeen. I really don't know.

Q. You mean pounds? A. In pounds; yes.

Q. You spoke about something being broken on that trigger this morning. Show the jury what that was. Explain to them.

A. There was two buckets made as this picture is, with a little lanyard fastened here (showing), that I had made fast here after dumping the bucket, and one bucket was broken right off across here as though at some time or other this handle came down here, got fouled and got wrenched out; then when they tried to straighten it out it had broken off right there. That is what the fracture of the metal indicated—that it had been broken off by trying to straighten it out.

(Testimony of John G. Young.)

Q. That was what you spoke about in your testimony.

A. That was the missing part on the handle that hangs down.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Just step down here, will you please?

(Witness does so.)

Q. I wish you would take the ruler and explain the situation to the jury. As I understood you this morning, you were the man on the hopper? [70]

A. Yes, sir.

Q. Now, when the bucket came over to you with coal, you were the man that dumped the bucket?

A. Yes, sir.

Q. Just explain how it was you dumped that bucket; that is, a bucket like you had down there. How did you operate the trigger?

A. Why, in the first place, the bucket comes to me; swings through the air.

Q. Yes.

A. And I have to get hold of that bucket and steady it and turn it so that when I release the catch, it will dump into the hopper; that is, square with the hopper; otherwise, it would get away from me because of the pitch of the coal. If I had it pointed towards me, I couldn't control it. So I have to stand alongside of the bucket so-fashioned, let it swing past and, as I release the trigger to let the bucket dump, it starts to dump there, and that

(Testimony of John G. Young.)

is the way I have control of it. When the bucket is dumped, when the bucket has dumped its load, it is heavy enough on the back end to swing up into the normal position and I still have hold of it. Sometimes it doesn't answer quickly on account of coal sticking in it, which destroys the balance; then I have to help it out to get it into position so that this latch will engage and then I have to take this lanyard and make it fast.

Q. In pulling the trigger, do you pull your lanyard towards the nose of the tub or towards the back of the tub?

A. Towards the nose of the tub. [71]

Q. Now, as to the triggers on these tubs which you are referring to on March 8, 1922, on the "Latouche," was the trigger on the tub between the bail and the nose of the tub or between the bail and the rim of the tub?

A. Between the bail and the nose of the tub.

Q. Are you positive about that? A. Certainly.

Q. Now, wasn't the trigger— As a matter of fact, didn't the trigger come back in this fashion (showing)? A. Not at all.

Q. It didn't? A. No.

Q. Do you recall that clearly?

A. Certainly. This is where the load is (indicating). If the trigger isn't on this, you can't hold it.

Q. This particular picture that you have here you drew from another picture that Mr. Kehoe had of a cut?

A. Mr. Kehoe used the other picture to help him

(Testimony of John G. Young.)

in the design, to get the perspective correct or nearly so.

Q. Now, on the tub in question wasn't the axis also a little higher on the tub? Was the axis that far down?

A. Yes; it is possible that the axes on the tubs under discussion were not quite as low as that. I mentioned that, and we had it down here a little bit lower, but we raised it up. I didn't want to raise it up too high because then it would be above the center of gravity and it would be open to the same criticism that it wasn't correct, so I just left it a little bit low.

Q. And the radius of the handle or bail, was that four feet or [72] three and a half feet?

A. Well, that is figuring it pretty close. I couldn't tell you; I never measured it.

Q. You wouldn't say it wasn't three and a half instead of four feet?

A. No; I wouldn't pin myself down to within six inches. I never measured it.

Q. Now the tub has, on each side, an iron projection here that extends out a distance of about three inches, does it not—two and a half to three inches or so? A. In that neighborhood; yes.

Q. Now, as the bail comes back, the bail rests on that projection, does it not?

A. Comes down and reverses itself.

Q. And comes down so that the bail rests on that projection on either side; is that not true?

A. Yes; but you are speaking about dumping the

(Testimony of John G. Young.)

bucket. As you dump the bucket, as the bucket is suspended from here (indicating) the bail or handle that comes around and hits this nub.

Q. Oh, certainly; I realize that, but this is on the ground. If the tub is on the ground, like you have got it here and not in a suspended condition, but simply on the ground, that bail comes back; it comes back and rests on that projection, does it not, on either side—hits that projection on either side—that little peg (indicating)?

A. No; I don't think it will.

Q. What is to prevent it? It does when it is in the air.

A. It does when it is in the air; yes; but then this is up in the air and the bucket swings through the air. [73]

Q. The bucket—

A. (Interrupting.) In this case here, when you have that bail laying down on the ground, it extends out beyond here (indicating).

Q. In other words, you think that the bail extends—that what is now the top of the bail would strike the ground before the line of it could get down to the peg, is that it? A. I think so.

Q. The back of the tub has one wheel and the front two wheels? A. I believe so.

Q. And there is a very pronounced front and back to the tub, is there not? A. Certainly.

Q. As pronounced as you have drawn it in your picture. That is to say, I mean by that, that the

(Testimony of John G. Young.)

tub has a pronounced lip or dip to the front part; is that not true?

A. Well, the elevation of the front is as high as it is at the back, but I don't think there is any mistaking the front for the back of the tub.

Q. The line of the back of the tub is practically vertical, is it not, as you have drawn it here?

A. Approximately; yes. It may change a little bit.

Q. It may change a little bit with the curve at the bottom, but it is practically vertical in the general direction of the back? A. Yes.

Q. The front of the tub is practically— Is the lip practically as you have drawn it there?

A. Approximately; yes. [74]

Q. I think I understood you to say this morning that in your experience as longshoreman you had probably unloaded several hundred tons of coal. Is that correct, Mr. Young? A. Yes.

Q. When you say several hundred tons, how many hundred tons do you mean by that, approximately 300 or 500, or what do you mean by several hundred tons? A. Well—

Q. I just simply want to know your estimate.

A. It's rather hard to do. A man would have to figure out—when you bring it out that way a man would have to have access to the pay-roll and find out how many hours he had worked over a long period of time and then he would have to take his average capacity for work and find out that way. A man, an ordinary workingman doesn't stop to

(Testimony of John G. Young.)

think how many hundreds of tons of coal or freight or whatever else it may be, he has handled in two or three years.

Q. But I asked you what you mean by several hundred tons? A. Well, call it 300 tons.

Q. 300 tons? A. I expect so; yes.

Q. That is to say, you mean that you yourself have personally shoveled three hundred tons of coal? A. I believe I have.

Q. And over a period of how many years does that extend?

A. Well, I gave you a time this morning of 18 months. That would be during the winter months—six or seven months in the year over a period of three or four years.

Q. Was that all in the port of Ketchikan?

A. No, sir. [75]

Q. Where else besides in Ketchikan?

A. I shoveled coal in Juneau.

Q. Where else?

A. Well, I shoveled coal back East; I shoveled coal in Michigan.

Q. On boats?

A. No, I never worked on boats in the East.

Q. Well, now, I mean, when you talk about shoveling coal, I mean how much coal you have shoveled here in Ketchikan or in Juneau, where the conditions would be—

A. (Interposing.) Practically the same?

Q. Practically the same.

(Testimony of John G. Young.)

A. Why, I have never shoveled any coal here aboard ship in Ketchikan.

Q. You never have? A. No.

Q. That is to say, during all the time that you have worked in longshoring here in Ketchikan, you acted as hopper man, did you not?

A. No; not always. I only worked once on a hopper.

Q. In what capacity were you acting on those other occasions?

A. Those other times I handled freight; sometimes worked in the ship and sometimes on the dock.

Q. Now on this particular day what time did you go to work?

A. I believe it was about one o'clock.

Q. One o'clock in the daytime?

A. Daytime; yes.

Q. Was that when the "Latouche" first started to discharge coal? A. Yes.

Q. Who was in the hold working at that time?

A. Oh, I don't know. I believe there was a crew working on [76] it at the time.

Q. You think it was the crew? A. Yes.

Q. How long did you work?

A. I worked till midnight.

Q. What did you do after midnight?

A. I went home and went to bed.

Q. When did you next come back down to the boat?

A. The following day, about, oh, I don't know—somewheres around noon.

(Testimony of John G. Young.)

Q. You came down about noon the next day?

A. Yes.

Q. How long did you work there then?

A. I didn't go back to work.

Q. You didn't go back to work on the ship?

A. No.

Q. Was the ship discharged at that time?

A. She hadn't been discharged, but I think they only had to work a half an hour over, and instead of putting a new crew to work they just let them get through.

Q. The old crew were on and finished it?

A. Yes.

Q. You remember how many tons of coal they discharged at that time or had to discharge?

A. Why, I think it was in the neighborhood of 400 tons.

Q. About what quantity of coal did the ship discharge an hour during that occasion when you were working there?

A. Why, it would probably run about 18 tons an hour.

Q. About 18 tons an hour? [77]

A. They might have done better than that at times.

Q. In other words, what would be the maximum quantity, you think, per hour?

A. I don't think they would run more than twenty.

Q. Between eighteen and twenty tons an hour

(Testimony of John G. Young.)

would be about the maximum at any time during that period?

A. Yes; I imagine so. Of course, I don't know. I wasn't on the scales or anything like that, but just the way I feel about it.

Q. Well, you judge that from your experience in handling coal yourself and your experience as a hopper man and all those things? A. Yes; sure.

Q. Now, then, did each tub have a capacity of about six tons per hour?

A. I think it would be about that. The tubs follow one another. If one man isn't ready, the crew waits until that tub takes its rotation, except in the case of an emergency.

Q. Now, then, at the time that you quit at midnight, I presume the entire longshoring crew also laid off for their supper or their lunch or dinner?

A. Yes; we all knocked off for supper.

Q. At that time whereabouts was the crew working? What I mean, Mr. Young, to make it clear so that you will understand me, is how far down in the hold had the coal been removed?

A. They got down to the first deck and they had cleared out a little space in the forward half of the hatch.

Q. That is what is known as 'tween-decks?

A. I should say; yes. [78]

Q. And had all the coal lying immediately below the hatch itself been removed at that time?

A. No; my recollection is that there was a bank there five or six feet wide at the top and it sloped

(Testimony of John G. Young.)

down like that (indicating) and it was probably five feet deep. Might not have been quite five feet deep.

Q. How far did it extend from the forward—from a line lying under the, perpendicularly under the forward combing of that No. 2 hatch? How much aft of that do you think the line of coal extended at that time?

A. It didn't extend from the forward portion of the hatch aft. It extended from the after portion of the hatch forward.

Q. Well, I may not express it in a very seaman-like way. I am not a seaman. What I am trying to get at, so you will understand me, is what hatch were you working in?

A. I don't know how they number the hatches on that boat.

Q. Well, if No. 2 hatch is the hatch in the center of the ship is that the hatch they were working? Was it the hatch in the center of the ship just in front of the pilot-house and the cabin?

A. No; I really don't know. The deck was covered with a deck load. I don't know how the hatches are on that boat. There was one hatch open; whether there was more hatches on the boat, I couldn't tell you.

Q. Did you assist in unloading the powder that was taken off that trip?

A. No, sir; I didn't touch any powder.

Q. Then, you don't recall where the coal was that they were unloading? [79]

A. Yes; I know the way the coal laid in the hatch

(Testimony of John G. Young.)

that was open, but whether it was hatch 1 or hatch 2, I can't tell you.

Q. How far was the coal that was being taken out at that time— Did the pile extend out underneath the opening of the hatch or had the line of the pile by that time receded back in, so that the men, to get the coal, had to go underneath? A. Yes.

Q. How far back underneath do you think they went?

A. The coal had been dug out under the deck going forward.

Q. How many feet?

A. Well, it was dug out so that I couldn't see the line going forward. At my distance above the boat there, my angle of vision wasn't very— You know, it was rather sharp. I couldn't see under the deck that far.

Q. How far above the deck of the boat were you?

A. At times probably forty feet.

Q. At times forty feet, depending on the tide during that period? A. Yes.

Q. Were you in a position to see the men themselves? A. At times yes.

Q. Now from six o'clock in the evening on, what men were at work in the hold?

A. I really don't know who were working in the hold.

Q. Did you see them down there?

A. I could see figures.

Q. But you don't know who they were?

A. No; I don't. [80]

(Testimony of John G. Young.)

Q. You don't know whether McHugh was working there or not?

A. No; I don't know whether McHugh was on the boat or not.

Q. Now, then, after they got down to where the pile was after worked out, under the opening underneath the hatch itself, what method did they use relative to assigning any particular place for each subcrew of three men to work? I understood you to say this morning that three men were assigned to a tub and that they kept that particular tub?

A. Yes.

Q. Now, then, at what place did those particular men work?

A. I didn't assign the men. I don't know who assigned them. As a matter of custom, they throw a shovel at you and you grab it and go into the hold and look around at the men and you see a man at a bucket and you like the looks of this man, you work with him, and if you don't, you try and work with somebody else. I don't know whether those men were assigned to work together, or anything about it.

Q. I think you probably misunderstood my question. Possibly my question was not very clear. What I meant, Mr. Young, is this: there were three tubs working in the hold unloading coal.

A. Yes, sir.

Q. Did each tub, with its crew, go hit-or-miss fashion, or did for instance, No. 1 tub, we'll say, take the starboard wing of the hold, No. 2 the mid-

(Testimony of John G. Young.)

ships of the hold and No. 3 the port side of the hold, or how do they do about that?

A. Well, just as you work along, unless somebody gave you instructions to work out a certain wing first, then the other side. You just keep poking along, getting rid of the coal. [S1]

Q. So that the tub starting in amidships would keep working out that and the tub that started on the starboard wing would keep working there and the tub with three men on the port wing would keep working there? A. Just keep poking along.

Q. That is the ordinary custom, is it not?

A. Yes; agree the best you can.

Q. Now, then, in the experience you have had in discharging coal in Ketchikan and Juneau, the ordinary method of discharging coal is by means of tubs, is it not? A. Yes.

Q. Such as you got here?

A. Well, I have used tubs of that nature and description and other circular tubs, some deep and some shallow.

Q. Some of the companies use the old wooden tubs, do they not? A. Yes; sometimes.

Q. The Alaska Steamship Company used the iron tub something on the order that you have drawn your picture of here, do they not? Is that your recollection?

A. Yes; I think the Alaska Steamship Company use that. Once upon a time the old B—— line used to use the round tub.

Q. But that's some time ago?

(Testimony of John G. Young.)

A. That is a little while ago.

Q. How many iron tubs in that period, do you suppose that you personally have worked with?

A. That is a peculiar question to ask.

Q. Well, you say, Mr. Young, that you have had a good deal of experience in this work; that you have personally shoveled [82] and discharged 300 tons of coal? A. Yes.

Q. And, of course, I don't expect you to be able to say down to one or two or five of them, but I would like to have an idea of what your best judgment on that question is, as to how many of those tubs you have had experience with?

A. Well, now, if the "Latouche" comes up here three times and she uses the three same buckets, have you used three buckets or nine buckets or have you only used one bucket? You might chance to use the same bucket each time she comes up here.

Q. Well, give us an idea.

A. I rather imagine that I have used, handled or helped to load those different kinds of tubs, of that particular description—round ones that were high, round ones that were shallow and the wooden ones.

Q. How many did you say, or did you say the number?

A. I said I used those different types of tubs.

Q. But you can't recall the number?

A. No; I wouldn't hazard a guess under oath like this.

Q. Now, then, when the tub has been loaded, how do you get the tub back out, say for instance at

(Testimony of John G. Young.)

twelve o'clock P. — or just the last trip that was taken out before twelve o'clock, when they were working underneath in the hold down below the open space of the hatch, how was it done? After the tub is loaded, how is it taken back out of the hold?

A. Why, the winch driver goes ahead on his two falls; equalizes the strain on the two falls and then takes one faster than the other and takes it over to the dumping spot. [83]

Q. What is done with the bail?

A. The bail is hooked on to the— The hook from his hoisting gear is hooked into the bail.

Q. The bail is left in a vertical position?

A. Usually; yes.

Q. Will it stand when it is first hitched on?

A. Should be.

Q. How? A. The bail has got to be vertical.

Q. Now, assuming, Mr. Young, that this line here represents the open hatch. The open hatch comes out here— A. Yes.

Q. And we have got the tub in this instance, loaded with coal. A. Yes.

Q. Now, tell the jury what method is used to get that loaded tub out.

Q. You want to take it out by hand?

Q. I want to know what is the customary method of taking that loaded tub out of the hatch, out of the hold.

The COURT.—He means, start from the face of the coal in the hold.

(Testimony of John G. Young.)

Mr. ROBERTSON.—Yes.

A. A bucket of that size, if I were handling it, I would hook on the gear with the bail down.

Q. Yes, sir.

A. And pull the bucket up.

Q. In other words, the bail is brought over here, is it not (indicating)? A. Yes.

Q. And you hitch on the bail; you hitch on the bail then you [84] hitch on your tackle, your hook from your falls, with the bail out here, is that not correct?

A. Yes; that is the idea when you are that far out from the combing.

Q. And then he pulls it out?

A. Your hoistman then hoists or pulls it out. You have to walk alongside of your bucket and then securely latch your bucket so that he can take it out.

Q. Then when you get out over to where the hatch is, by the time you get out to where the hatch is, the bail, as it goes, gradually swings around in an arc until it becomes in this position (indicating), is that not true? A. That is the idea.

Q. And automatically locks, does it not?

A. It should.

Q. And then you put the becket on over this peg here, don't you?

A. Then you should make your lanyard fast.

Q. You fasten your lanyard over this peg, the same peg that you also use—that is, it is one of the pegs that is also used as a matter of fact, to

(Testimony of John G. Young.)

stop the swing of the bucket around when it is eventually dumped in that condition? A. Yes.

Q. And then it rises in a vertical position, is that correct? A. That's the idea.

Q. Now, then, how is a loaded bucket taken out by hand?

A. You have to drag it out if you are going to take it out by hand.

Q. Is it customary to drag it out by hand? [85]

A. It all depends where you have got to go. If you are only a few feet from the square of the hatch it's easier for three men to surge against that bucket and boost it those couple of feet than it is to go up and pull your heavy gear in and take your bail down and take it out by machinery.

Q. Do they pull it out or push it out?

A. Just whichever way your weight will count best.

Q. Now, then, on these buckets, right here where I have put this little line there (pointing), or approximately in that position, Mr. Young, on each side, isn't there an iron handle there?

A. Well, I would say this moment that I have no recollection of handles of any description on any of those tubs. In my work up there on top of those machines, that hopper, I did not wait to get hold of a handle, because I have got a two-foot platform to stand on, and if I get hold of anything, you know, with a firm grip on a handle, in case of anything letting go and the bucket getting away from me, I can't let go of that handle quick

(Testimony of John G. Young.)

enough; so for that reason and the fact that I didn't use them, the position of any possible handle is not clear in my mind, because I didn't use them. I would simply take the side of the bucket or the bail as it came by to steady it.

Q. Well, while you don't have any recollection of these three particular buckets, as a matter of fact on most of the iron buckets, they do have such handles on the lip?

A. Very rarely that I have seen rope handles.

Q. I am not speaking about rope handles. I said an iron handle up there (indicating); an iron handle where I put this mark. [86] Isn't that correct? When I say an iron handle, Mr. Young, I mean something about like that, so you can put your hand in and pull it along, like that (showing). I don't mean an iron handle protruding or something sticking away out here.

A. Well, there might be.

Q. On that point you simply don't recall as to whether there were or were not? A. No.

Q. Is that true? A. No; I can't recall.

Q. You had no particular occasion to note that?

A. No.

Q. Now, how soon after you started to work was it that the first bucket that was brought up hit the side of the hopper and dumped into the bay?

A. Why, I don't know how many minutes it was after we started to work. When I started to work the mate hollered up from the deck—at least I think it was the mate—somebody apparently in

(Testimony of John G. Young.)

authority—shouting up to me to center the boom, to center my boom, which I did. It took a few minutes to get the boom lowered out and the braces set up so as to hold her reasonably fast or rigid, and after that little interval, my recollection is that we hoisted an empty bucket to see if I had centered it, and that was satisfactory to the winchman, and we sent the empty bucket down and we started with a full load and my recollection is that the first full load that came up was dumped right there, as I said this morning, partly into the bay and partly on the dock, and probably some of it went aboard the ship.

Q. The first full load, or the first bucket containing the [87] first full load, struck the side of the hopper? A. Yes.

Q. Now, is that a very unusual occurrence, Mr. Young, when you are first preparing your work and getting it started to have a tub dump?

A. Under the circumstances; yes.

Q. Why under the circumstances?

A. Why, the position that the bucket was in.

Q. I see.

A. The bucket was away up near the point of the boom. The tide was low and it was taxing the capacity of the boom to clear, that is to hold the bucket up there (indicating) enough to clear the top of the hopper.

Q. Which side of the bucket struck the side of the hopper?

(Testimony of John G. Young.)

A. My recollection is that the bucket struck lip-on to the side of the hopper.

Q. Your recollection is that it struck lip-on?

A. Yes; that is my recollection.

Q. Did it strike a gentle blow?

A. No; it hit it a fair rap.

Q. Hit it quite a little bump?

A. I hung on, on where I was.

Q. You were jiggled around? A. Yes.

Q. I presume you were wondering what was happening?

A. No; I knew what was happening. It was coming off right at my feet.

Q. How much of the coal did it spill out?

A. The bucket emptied. [88]

Q. It emptied all of it out?

A. All the coal; yes.

Q. Did it turn it back so that the tub swung up in an arc?

A. The tub just flipped around and went up to nearly the normal position.

Q. Even a tub in the ordinary good condition might have that happen to it, might it not?

A. Oh, I expect you could make most anything happen if you handle it roughly enough.

Q. Well, that was a pretty rough jar that tub got? A. Yes.

Q. You got a rough jar where you were standing up near the hopper?

A. Yes; the whole apparatus got quite a jar; yes.

(Testimony of John G. Young.)

Q. Were you much astonished to think that the tub dumped its coal?

A. No; I would have been astonished if it hadn't dumped.

Q. Now, how many more times during that afternoon were any of the tubs dumped into the bay?

A. Well, that is rather a hard thing. I didn't hold a stop watch on them.

Q. I didn't say the time. I asked you how many more, or at least, I meant to say how many more that afternoon. How many more tubs of coal were dumped into the bay that afternoon?

A. That is a hard thing. I couldn't tell how many were dumped; several tubs were dumped.

Q. Several?

A. Several. One in particular dumped in mid-air, without having [89] touched anything.

Q. Now, then, we get back to that word "several" again. When you say several, about how many do you mean? It's so very indefinite. I can't tell how many you mean, and I don't think the jury can, or anybody else.

A. Well, I guess ordinary folks have got an understanding of what the word "several" means. If it gets up into the hundred or something, I suppose a man would say a hundred or more got upset.

Q. You mean there was a hundred tubs of coal—

A. (Interrupting.) No; I don't mean a hundred. I mean that the average, ordinary mortal like myself would say several if he meant, you understand, a few.

(Testimony of John G. Young.)

Q. Well, I know, but would you say it was five?

A. I would would not say there was not more than five. I wouldn't be at all backward about claiming that there was five dumped, though.

Q. Would you say there was not more than seven?

A. No; after this interval, I wouldn't care to make a definite statement. There was several buckets dumped. I believe there was five. I know there was the one that I speak of that struck the hopper and one more that dumped in midair. That's two. That only leaves three for the balance of the twelve hours.

Q. On other occasions when you have been unloading coal, you have also seen tubs spill out some?

A. Once in a while you would see a tub dump.

Q. Now, in this work, were you what is known as the longshoremen boss?

A. That's too deep for me. [90]

Q. Well, now, in a crew unloading ships here, discharging coal in March, 1922, the first of March, as a matter of fact wasn't the man on the hopper always known as the longshoreman boss?

A. No.

Q. Wasn't that the position—

A. (Interrupting.) No; the longshoreman boss' position was under the roof.

Q. Did you have a longshoreman boss on this occasion? A. Yes; I believe there was.

Q. Who was that?

A. A man by the name of Pauzi.

(Testimony of John G. Young.)

Q. What was his name? A. Pauzi.

Q. Was he present there all during this time?

A. I believe he was.

Q. Were you employed as a longshoreman? Was that your work, I mean to say, as hopper man, employed as longshoreman?

A. I was put to work to go up there on the hopper and dump those buckets.

Q. Did Mr. Pauzi put you to work there?

A. Yes; Mr. Pauzi asked me if I wanted to go to work and I asked him where, and he said if I wanted to, I could go up on the hopper, and I told him all right, I would go on the hopper.

Q. Mr. Pauzi came around and located you and sent you down to the ship. Is that correct?

A. Why, I think I came walking on the dock and he shouted at me or called me over. [91]

Q. Now, at six o'clock did you leave for your supper or your dinner?

A. Yes; at six o'clock that night.

Q. Yes.

A. We knocked off. I think it was six.

Q. And did the crew knock off at that time?

A. The men in the hold also.

Q. What time did you go back to work?

A. I think it was seven o'clock.

Q. When you went back to work was there a new crew in the hold? A. No; I don't know.

Q. When did the crew of longshoremen go to work discharging the vessel?

A. Well, distinguishing between the crew and

(Testimony of John G. Young.)

the longshoremen, I couldn't do that. I don't know who were members of the crew nor who the longshoremen were.

Q. I understand you to say, then, that, as a matter of fact, you don't know that any of the crew of the vessel itself did any of the longshore work. Is that correct?

Q. I have an understanding that that was the case, but I really don't know. I don't know the individual members of the crew on that tub and I don't know whether any of those men were working in the hold. I have been told—that same day I was told that the crew would work until six o'clock and they would hire longshoremen, then, to finish this work; finish the shift, because they could work the crew until six o'clock at the regular pay and then they would have to pay overtime; so that was the way they were going to work it; work the crew until six o'clock and then put the longshoremen [92] on.

Q. But you don't know whether that happened or not?

A. Whether that happened or not, I don't know.

Q. Now, then, during the time that you continued to work, up to twelve o'clock, how many tubs were in operation?

A. Well, when we knocked off at midnight, there was three tubs in operation.

Q. How long had you been operating with three tubs?

(Testimony of John G. Young.)

A. Oh, I really can't tell you when we started operating with three tubs; that is, working steady with three tubs. When we first started unloading the ship, we started with three tubs to break down the hatch and one tub developed a radical way of behaving, so that tub was thrown to one side, because the men working in the square of the hatch, you know, there was no protection, and the tub was thrown to one side and we worked with two tubs, and the men split up and did the best they could to get along peaceably, and after, when they got the hold opened up so that they could get down and have room for the three buckets—at what time that happened, I don't know—but this third bucket came back into service.

Q. When they broke into the cargo of coal immediately under the hatch at first, there was ample room for all three of the tubs, was there?

A. Well, hardly in the beginning.

Q. Hardly in the beginning? A. No.

Q. Now, then, would you say— Does your recollection say whether or not the three tubs were working all during the evening at the time you went back on shift after supper, at [93] seven o'clock?

A. My recollection is that from supper time on, the three tubs were working. It was some time during that afternoon that they got the coal broken down to the hatch covers, or between decks so that they could spread out a little bit and get to working out into the wings.

(Testimony of John G. Young.)

Q. Yes, sir.

A. But what time that took place, I couldn't tell you.

Q. Now, then, did I understand you to say that this crew of nine men in the evening only had a lantern to work by?

A. No; I didn't say that they had a lantern to work by.

Q. What did you say? You said something about it.

A. I said that I had the lantern to work by.

Q. Oh, you had a lantern up on the hopper?

A. Yes.

Q. Were you down in the evening, down where the men were?

A. No; I didn't go aboard the ship until I went to get paid off.

Q. That was the next day? A. At noontime.

Q. At noontime the next day? A. Yes.

Q. How far distant were you— Well, I think you said a moment ago that, depending on the tide, you were distant up as much as forty feet away from the men. Is that what I understood you to say?

A. Yes, I expect it would probably amount to forty feet at that time, at times.

Q. Do you know whether or not there were lights down in the hold? [94]

A. There were lights down in the hold.

Q. What kind of lights did they have down there?

(Testimony of John G. Young.)

A. Why they had a cluster of lights. I imagine there was four lamps in the cluster—small lamps.

Q. Electric lights? A. Electric lamps; yes.

Q. Might there not have been as many as five globes in the cluster?

A. There might have been; yes.

Q. Where was this cluster of lights hung?

A. One cluster was hung right alongside of the midship stanchions on the forward square of the hatch.

Q. That is, that would be,—if they were standing on the 'tween-deck, it would be just above?

A. Just above your head level, or about your head level.

Q. There was a cluster of lights hung on the coaming of the hatch right below where the winchman stood, was there?

A. Well, that is where the winchman stood.

Q. Oh, that is where the winchman stood?

A. I believe so.

Q. Oh, you mean if the lights—

A. (Interrupting.) Yes, I believe there was one cluster of lights approximately under his feet.

Q. Yes, sir.

A. Fastened against the midship stanchions; and I think also there was a light diagonally across the hatch fastened against the coaming, on the after coaming of the hatch, on the starboard side.

Q. Would you say that there weren't two clusters hung there, along where the winchman was—that is to say, just below him? [95]

(Testimony of John G. Young.)

A. Well, now, there might have been two clusters hanging back to back there.

Mr. WICKERSHAM.—You mean underneath the deck on which he stood?

The COURT.—I think he meant on the deck.

Mr. WICKERSHAM.—That's what I wanted to find out.

Q. I mean, Mr. Young, the winchman, which deck does he stand on?

A. He stands on the main deck, I understand it is.

Q. The winchman stands on the main deck?

A. Yes.

Q. The coal was on the 'tween-deck?

A. Yes.

Q. That is just below the main deck, is that not true? A. I believe so.

Q. The winchman operated his winch right aft of the hatch, did he not, where you were breaking into the coal? His winch was just to the rear of the end of the hatch, isn't that correct?

A. We were using the forward booms. We weren't using the after booms. How would they have the after winch hooked up on the forward booms?

Q. I don't mean—

A. (Interrupting.) It wouldn't have to be the after winch or the forward, but it would have to be the after hatch.

Q. When you got the hatch cover off, where did the winchman stand with reference to that hold?

(Testimony of John G. Young.)

A. I think the winchman stands pretty close to the edge.

Q. Pretty close to the edge; and which way is he facing—towards [96] the front part of the ship? A. No.

Q. Or towards the stern of the ship?

A. He is facing the stern of the ship.

Q. And then the aperture of the hold is right at his back?

A. No; he is facing the stern of the ship and the hatch is open in front of him.

Q. Was the coal that was broken down and taken out from this hole after you cleared it out, right underneath the hatch itself? Did the coal pile extend, that you were working on, I mean—

A. (Interrupting.) Yes.

Q. Did it extend forward or sternward?

A. The coal that they dug into, they were working in a forward direction after the coal.

Q. They were going towards the bow of the ship?

A. They were going towards the bow of the ship after the coal.

Q. And from where the winchman stood—

A. (Interrupting.) He would be underneath it.

Q. If you were standing where the winchman stood at that time, would it have been possible for you to have seen up towards where the men were working?

A. No; you would have to see around two corners.

Q. What two corners?

(Testimony of John G. Young.)

A. The corner of the deck here (indicating) and the corner going back under.

The COURT.—In other words, the men were working directly under the winchman?

The WITNESS.—Almost directly under the winchman.

Q. They were almost directly under the winchman. Is that it?

A. I would say that that is just about where they were— [97] underneath him; that is, they weren't exactly underneath him. As they were clearing out the wings, they were spreading out, but they were working by in a line past him.

Q. Now, then, going back to the lights again, you don't know how many lights were down in the hold itself? A. Altogether I couldn't tell you.

Q. You couldn't see them, could you?

A. My recollection is that there was a couple of clusters.

Q. You stated that there was a glare that you could see from where you were on the hopper?

A. Yes, there was a glare. I was standing practically in the darkness, you see.

Q. You were standing in the dark? A. Yes.

Q. And the glare hurt your eyes?

A. Oh, I wouldn't say that it blinded me, but it was a very pronounced light against the total darkness all around.

Q. From where you worked you could see the men?

A. Whenever I would get out to the edge of the

(Testimony of John G. Young.)

platform I had to stand on, I could look down to the hold and if any men were moving around in the square of the hatch, I could see them.

Q. Could you see the buckets down there?

A. At times, yes.

Q. Did I understand you to say that you knew none of the men of the crew except Mr. Pauzi? I mean of the longshore crew.

A. Why, Pauzi was working on the dock.

Q. You knew none of the names of the longshoremen working down in the hold at all? [98]

A. No; I didn't. I didn't know any of them. There might have been men working aboard the boat that I knew well, but I didn't know that they were aboard the boat and I didn't distinguish them.

Q. Were some of them Indians?

A. That I couldn't tell you.

Q. You weren't there when the accident occurred?

A. No, sir.

Q. You left how soon after twelve o'clock? Did you leave immediately? A. Yes; right shortly.

Q. Where did you go—home? A. I went home.

Q. Did you come uptown or something like that?

A. I said I went straight home. I don't believe I stopped to eat. I went home.

Q. On these tubs, was there anything on the lip of the tub by which the hook from the tackle or the falls, whatever you call it, can be hooked on that and the tub pulled forward that way?

A. No; I don't think I ever saw a bucket rigged up that way.

(Testimony of John G. Young.)

Q. Never saw one rigged that way at all?

A. No.

Q. And at the back there is one wheel?

A. Yes; there is one wheel. We tried to draw it in there about where it belongs.

Q. Is that represented here?

A. Yes; that (indicating) is supposed to represent the hind rollers.

Q. The forward two rollers? [99] A. Yes.

Q. Diameter of about five or six inches about, are they?

A. No; I wouldn't say they are that large. I don't think they are five inches.

Q. You wouldn't say they weren't five inches?

A. I never put a rule on them. I calculated them.

Q. And they are about an inch or two inches in thickness, are they not?

A. You mean the tread?

Q. Yes; the tread.

A. Oh, no; the tread is more than that.

Q. I mean—I don't know the right term.

A. The surface that would run on the ground?

A. Yes; the surface.

A. Oh, the surface that would run on the ground or deck, I believe, would be about four inches.

Q. About four inches?

A. Yes; it might be three and a half.

Q. Now, Mr. Young, I want you to refresh your memory again about where the winchman stood. Isn't it a fact that the winchman on the "Latouche,"

(Testimony of John G. Young.)

up there discharging that cargo that night stood astern of the hole, that is astern from the hold and that from where he stood, or if you had stood there, or anyone else, you could look down and look forward and look underneath where the men were working?

The COURT.—You mean, abaft the hold?

Mr. ROBERTSON.—Pardon?

The COURT.—You mean abaft the hold? [100]

Mr. ROBERTSON.—Yes, sir.

Q. Isn't that correct. Let me just draw a little diagram. I'm not much of an artist, but just to show you what I mean.

The COURT.—He can understand that.

The WITNESS.—The jury won't, though.

Q. This is the bow and this is the stern and this is the hatch (indicating). A. Yes.

Q. The hold of the hatch. If the winchman was standing on the sternward side of that hold instead of on the forward side of the hold, isn't it true that from his position he could look forward down to where the men were working down in here (indicating) and down in there?

A. If the winchman was standing abaft the hatch, why certainly he could look forward a certain distance along between decks, but if you ask me to say that he was standing there, I can't make a statement like that and have it jibe with the fact of the forward boom being used. How would they let their falls aft of the hatch and clear the hatch so that they could use the after winches?

Q. Where do you claim the forward falls were?

(Testimony of John G. Young.)

A. I claim they were using both booms.

Q. Where do you claim that was—abaft or forward?

A. The front booms were extending from the foremast.

Q. What is their position relative to that hold?

A. That would be on the opposite side of the hatch from the winch driver.

Q. On the opposite side of the hatch from the winch-driver. A. Yes; surely. [101]

Q. Well, as a matter of fact, you don't know at this time whether or not the winchman was standing abaft the hatch or forward of the hatch, do you? You don't know that, do you?

A. I claim that the winch-driver's position was forward of the hatch.

Q. In other words, you claim that he was forward of the hatch and that below, on the 'tween-decks, the men were working forward of that line, of a line that would go up and down there along from the hatchway there. Is that right?

A. Here's the men down in the hold (indicating), having got clear of the coaming of the hatch. They would be working forward, underneath the winchman.

Q. Are you sure of that, Mr. Young?

The COURT.—Can you visualize it?

A. As a practical man, I can't visualize how else—

Q. Do you feel as positive of that as anything else you have said in your testimony?

(Testimony of John G. Young.)

Mr. WICKERSHAM.—Oh, I object to that.

The COURT.—Objection sustained.

Q. Do you feel that you might be mistaken about that, Mr. Young?

A. I might be mistaken with reference to the position of the winch-driver on the deck; yes.

Q. Yes.

A. Because as a practical man, I can't see why he should be standing aft of the hatch with all his gear running forward. He has got to lead through too many blocks to operate successfully.

Q. And might you not be mistaken about the gear on the ship and the falls and all that as to the position that you have embodied in your answer? [102]

A. What do you mean? About the forward booms?

Q. Yes. Might you not be mistaken about the relative position on the boom?

A. Mistaken about the forward booms being used?

Q. As to their relative position to the hold. Don't you know what the word "relative position" means? A. I expect so.

Q. I asked you a very simple question. I asked you whether or not you might not be mistaken as to the relative position of the forward booms relative to this hold in which the men were unloading coal out of?

A. The forward boom was forward of the hatch or aft of the hatch, is that what you mean to ask me?

(Testimony of John G. Young.)

Q. Yes.

A. The forward boom must be forward of the hatch, or it wouldn't be the forward boom.

Q. It must be forward of the hatch? A. Yes.

Q. You don't think there is any possibility that you are mistaken about the relative position of the boom?

A. That is, one end of the boom is on the forward mast and the other is hanging on the forward mast.

Q. And you feel confident that the winchman was using that fall from off that boom, do you—that he was using the tackle from off that boom—do you, or don't you, feel confident of that?

A. You put it in such a way that a man can't believe his eyes.

Mr. WICKERSHAM.—Well, just answer the question. If you are not sure, tell him so; if you are not confident of it, say so. [103]

A. As a practical man, I can't see how he could run the—

The COURT.—Well, the question is— Repeat the question.

(Question repeated by reporter.)

The COURT.—That means if the winchman was using the fall off the boom attached to the forward mast.

The WITNESS.—Oh, there is no question at all that the buckets were being hoisted out of the hold with the gear hanging from the forward mast.

Q. Is there two boom-sticks there—boom No. 1 for hatch No. 1 and boom No. 2 for hatch No. 2?

(Testimony of John G. Young.)

A. I expect the boat carries four booms.

Q. Is that true what I asked you? I didn't ask you to ask me a question.

A. We have two booms on the forward mast.

Q. You have two booms on the forward mast?

A. Yes.

Q. Which one is used for No. 2 hold?

A. I expect you have to use both of them.

Q. You used No. 2 boom on No. 2 hold?

A. It's hardly fair to ask me whether we used No. 2 boom on No. 2 hold. I don't know how they number those hatches on ships.

Q. I told you in the first place, Mr. Young, that I was assuming that the hatch practically amidships is No. 2 hatch and I have been asking all my questions on that assumption. A. Yes.

Q. And you heard me say it.

Mr. WICKERSHAM.—I object to counsel's quarreling with the witness.

The COURT.—I think so, too. You asked one question as to [104] the assumption of the main hatch in the center of the boat being No. 2 hatch, but you never carried that assumption through the remainder of your questions.

Q. All right, if the Court please; then all the questions I asked are to the effect that No. 2 hatch is the hatch that is practically in the center or amidships. On that assumption, you still want to make your contention relative to, as regards the relative position of where the winchman stood that night when you were working on that cargo?

(Testimony of John G. Young.)

A. Well, can I ask a question?

Q. Yes, sir.

A. What is the number of the hatch that we're working on?

Q. No. 2 hatch.

A. We're now working on No. 2 hatch?

Q. Yes, sir; that's it. A. No. 2 hatch.

Q. Yes, sir.

A. We were unloading No. 2 hatch with the hanging gear from the forward mast. It was the booms hanging from the forward mast that were unloading that hatch No. 2.

Q. And that forward boom was forward of No. 2 hatch, is that correct? A. Yes, surely.

Q. And the winchman stood forward of No. 2 hatch. Is that correct?

A. Well, I claim that is the practical position for him to be in.

Mr. WICKERSHAM.—Well, I ask the Court to instruct him that if he knows— [105]

The COURT.—He has already answered it two or three times that he wasn't confident.

Mr. WICKERSHAM.—Well, then, I object to any further question on the subject.

The COURT.—Objection sustained.

Mr. ROBERTSON.—The reason I asked him that, your Honor, is this: As I understood, Mr. Young—Im not trying to do him an injustice or to trap him—he placed one of the clusters of light relative to where the winchman stood. Now, I am trying to get the winchman definitely located, so I

(Testimony of John G. Young.)

can also ascertain where the cluster of lights was. He told us that there was a cluster of lights, as I understood him to say, just below the winchman. I am trying to find out where it is he claims that the winchman was so that I can know where the lights were.

A. I described the cluster as hanging from the midships stanchions, didn't I?

Q. And also relative to the winchman.

A. Should be under his feet.

Q. Right under his feet? A. Yes.

Q. Then whereabouts on the midship stanchions would they be to the forward or the rear part of the hold?

The COURT.—Midship stanchions or stanchions running in the middle of the boat, running sideways, running right through the center of the boat?

A. Yes, from stem to stern.

Q. Yes, but I say, with reference to the forward or rear of the hold? [106]

A. With reference to the forward coaming of the hatch, there (indicating).

Q. That is to say, you mean right about there (indicating)? A. Right about there; yes.

Q. On the midship stanchions; on the forward coaming of the hatch, is that what you mean?

A. That is what I was trying to convey.

Q. Yes. And you claim that the winchman was standing just above the cluster of lights, is that it?

A. I believe he was.

Q. Were there any clusters of lights also hanging

(Testimony of John G. Young.)

on the coaming of the hatch, on the rear, or back coaming of the hatch?

A. I described that one also.

Q. There was also one there?

A. I described one there, hanging—it would be down in the corner, and I should judge, on the bottom part of it. Just about in there; yes.

Q. On the starboard side?

A. Starboard after quarter of the hatch coaming.

Q. Those clusters of lights didn't illuminate the place where the longshoremen were working, did they?

A. I presume they did, or they would have shifted them so that they would.

Q. It is possible to shift them forward?

A. Yes; they are not fixtures; they're simply extensions with reflectors about the same as a wash basin, with lamps stuck in them.

Q. With reflectors in the back?

A. Reflectors in the back of about the size and shape of a wash basin; yes, sir. [107]

Mr. ROBERTSON.—I think that's all.

Testimony of Frank Alfred Williams, for Plaintiff.

FRANK ALFRED WILLIAMS, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name.

(Testimony of Frank Alfred Williams.)

A. Frank Alfred Williams.

Q. How old are you, Frank?

A. Twenty-six, going on twenty-seven.

Q. What is your business?

A. Well, I have no particular business.

Q. Have you ever worked at longshoring?

A. Yes, sir.

Q. How much have you worked at longshoring?

A. Well, not very much.

Q. Did you do any work about the eighth or ninth day of March last, a year ago, in 1922?

A. Yes, sir.

Q. Where? A. On the dock.

Q. On the "Latouche"?

A. On board— Yes, sir.

Q. When did you begin to work on the "Latouche"? A. Midnight; after midnight.

Q. At one o'clock? A. Yes, sir.

Q. What day was that? Was it the night of the eighth?

A. I can't remember what date of the month it was. [108]

Q. Who worked with you?

A. Well, there was two other fellows with me.

Q. Who were they?

A. I don't know the young fellow's name, but one of the fellows that got hurt, I know his name.

Q. Is that he, sitting over here (pointing)?

A. Yes, sir.

Q. Barney McHugh? A. Yes, sir.

Q. You were working with him? A. Yes.

(Testimony of Frank Alfred Williams.)

Q. At what time did you begin to work?

A. At midnight.

Q. One o'clock? A. One o'clock.

Q. At night? A. Yes, sir.

Q. Was he hurt that night? A. Yes, sir.

Q. How long after you began to work with him was he hurt? A. I can't say just how long.

Q. Well, about how long? A few minutes don't make any difference.

A. Oh, it wasn't very long after we started to work.

Q. Half an hour or so?

A. No; I can't say it was a half an hour.

Q. How was he hurt?

A. Well, the bail of the bucket he was using fell on his foot. I don't know which side of the foot it was. Across here (indicating). [109]

Q. What were you doing just at that time, Frank?

A. I was on one side of the bucket, pushing on it.

Q. Where was he?

A. He was on the back end of it, pulling it.

Q. He was pulling it? A. Yes, sir.

Q. What fell on him? A. The bail.

Q. What caused it to fall?

A. I don't know just what caused, but my idea was—

Mr. ZIEGLER.—Just a moment. We object to what his idea of it is.

Q. Just tell what you saw, what happened there.

A. Well, I was pushing on it, me and the young

(Testimony of Frank Alfred Williams.)

fellow was pushing on it, on the bucket—he was on one side and I was on the other—and Barney was pulling on the bucket, and the jar knocked— It was a kind of a rough place where we handled this bucket, and the jarring of it, I guess, loosened the bail of the bucket and it fell on his foot.

Q. What did he do after the bail fell on his foot?

A. He just naturally sat down. He couldn't move—I guess it hurt him so much—and we went over to see what happened, and he said the handle come down on his foot.

Q. What became of him? A. He left.

Q. Where did he go?

A. On the top deck somewhere.

Q. Who helped him up, if anybody?

A. Well, "anybody," myself and I forget who the other fellow was, [110] helped him up on deck.

Q. Did anybody come after that time to take Barney's place? A. Yes, sir.

Q. Who came?

A. There was another fellow. They call him Captain Gillis. I don't know—

Q. (Interrupting.) Call him what?

A. Call him Captain Gillis. I don't know what his right name is.

Q. Do you see him in the courtroom?

A. Yes, sir.

Q. Where is he?

A. The second man up there (indicating).

Q. Is that the man (pointing)? A. Yes, sir.

(Testimony of Frank Alfred Williams.)

Q. How long after Barney was hurt did he come there?

A. I don't know just how long it was.

Q. Frank, tell the jury what there was about this bucket to handle it with. Were there any ropes around it or anything to pull it or push it with?

Mr. ROBERTSON.—Now, if the Court please, we object to that as too leading.

Mr. ZIEGLER.—Let him describe the bucket.

Mr. WICKERSHAM.—Well, I am asking him to describe the bucket.

The COURT.—Yes; he can state. He asked generally.

Mr. WICKERSHAM.—Yes.

The COURT.—Was there anything on the bucket to handle it with?

A. Nothing that I know of.

Q. Was there any rope attachment to pull it by?
[111]

A. No, there was no rope; never noticed any rope.

Q. How did you handle it? Just tell the jury how you did handle the bucket.

A. Well, the way we handled the bucket—here (indicating) is the bucket; one man on that side and another man on that side. We shoved, we pushed on it.

Q. Yes.

A. Barney in front, pulling on the bucket and there is a bail right here (indicating); not exactly in the center, but towards the back part of it. Now,

(Testimony of Frank Alfred Williams.)

this is the position we was in when Barney got hurt. I was pushing on it and the other young fellow—

Q. (Interrupting.) You were pushing on the side of the bucket. Just show the jury what you were pushing on.

A. He was on this side; I was here (showing); the other fellow on the other side, and Barney was on this side (showing).

Q. Pulling? A. Yes, sir.

Q. Whereabouts did you have hold of the bucket?

A. Right here (indicating); about in there and here.

Q. On the top of the bucket? A. Yes, sir.

Q. How far did you have to push the bucket?

A. About twelve or fifteen feet under the hatch.

Q. How far had you gone from the coaming before the bucket, before the fail fell?

A. About half way.

Q. How long was that bucket used after Barney was hurt? A. You mean, how long we used it?

Q. Yes. [112]

A. I don't know just how long after—

Mr. ROBERTSON. (Interrupting.) We object to that as incompetent, irrelevant and immaterial. That's after the accident as I understand it, isn't it? Is that what you mean, after the accident?

Mr. WICKERSHAM.—Yes.

Mr. ROBERTSON.—Well, we object to it as not part of this case—what took place after the accident happened.

(Testimony of Frank Alfred Williams.)

The COURT.—Well, I'll hear from you on that. I think—

Mr. WICKERSHAM. (Interrupting.) I want to show simply that the bucket was laid aside.

The COURT.—I'll hear from Mr. Robertson on his objection to that. If it can be shown that laying it aside after the accident is not material, I would like to know it.

Mr. ROBERTSON.—Well, it seems to us that what happened to the bucket after the accident is immaterial. The question, as I understand is as to the condition of the bucket at the time of the accident, or preceding the accident; not afterward.

Q. Was there any change made in the bucket after Barney was hurt?

Mr. ROBERTSON.—The same objection.

The COURT.—Objection overruled.

Mr. ROBERTSON.—We take an exception.

Q. By anybody?

A. Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets. [113]

Q. Do you know whether that bucket dumped itself when it was being taken out at any time?

Mr. ROBERTSON.—I object to that as leading, if the Court please.

Mr. WICKERSHAM.—I asked him if he knows anything about it.

(Testimony of Frank Alfred Williams.)

The COURT.—Objection overruled.

Do you know whether or not—

A. I don't remember. I can't say, because I was underneath the hatch. I can't see on deck of the hatch.

Q. Do you know whether there was anything, any block of wood put in between the handle and the bucket to hold it at any time that night?

Mr. ROBERTSON.—The same objection.

A. I never noticed.

Q. You didn't notice that? A. No.

Q. Did you notice whether or not the tripper was broken in any way?

Mr. ROBERTSON.—I object to that as leading, if the Court please.

Mr. WICKERSHAM.—I asked him if he knows it.

Mr. ROBERTSON.—Why don't you ask him the condition of the bucket?

Mr. WICKERSHAM.—Well, I'll ask him the condition of the tripper then, whether it was broken or in good shape.

Mr. ROBERTSON.—Object to that as leading.

The COURT.—Objection overruled.

A. I never noticed any.

Q. You never noticed? [114] A. No.

Q. Did the handle fall more than once that night, Frank? A. No.

Q. You don't remember it falling but once?

A. I don't remember, unless we laid it down ourselves to get it out of the way.

(Testimony of Frank Alfred Williams.)

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Barney McHugh and yourself and one other young fellow, you worked on one bucket, is that what I understood you to say? A. Yes.

Q. The other young fellow, is he an Indian?

A. No, sir.

Q. What is he? A. I don't know what he is.

Q. White man?

A. He is a white man, I know.

Q. You don't know his name, though?

A. No, I don't know his name.

Q. How long did you three men work together?

A. I can't say just how long.

Q. What time did you first go to work unloading coal off the "Latouche" that time?

A. Midnight; one o'clock.

Q. You just came off to get your supper, is that it, and went back to work at midnight?

A. No; I went to work at midnight; one o'clock.

Q. Had you worked any before midnight? [115]

A. Not on that boat.

Q. You hadn't worked on that boat at all unloading coal before midnight?

A. Not before midnight.

Q. New crew went on at that time, is that right?

A. Yes, sir.

Q. Now, I understood you to say, Frank, that at that time you were pushing on the bail on one side of the bucket?

(Testimony of Frank Alfred Williams.)

A. I wasn't pushing on the bail; I was pushing on the bucket.

Q. Pushing—

A. (Interrupting.) On the bucket; not the bail.

Q. Pushing on the bucket?

A. Not on the bail.

Q. On the rim of the bucket?

A. On the rim; yes, sir.

Q. On the rim of the bucket, toward the lip of the bucket, the front part of it?

A. Pushing the other way; back part of it.

Q. You were pushing on the bucket. What part of the bucket do you call this—the nose?

A. I don't know what you call it.

Q. Or the lip?

A. Nose or the lip; I don't know.

Q. The bucket has got a kind of a lip on it like that, hasn't it? A. Yes.

Q. You were pushing, you three men. You were on this side pushing the bucket so that this part of it goes that way, or which way? [116]

A. No; not three men pushing. Two men were pushing, one was pulling.

Q. Who was the man pulling? A. Barney.

Q. Where was Barney pulling?

A. On that end (showing).

Q. Barney up here (indicating)? A. Yes, sir.

Q. What did Barney have hold of, the rim?

A. Yes, sir.

Q. Pulling the same way that you did?

A. Yes, sir.

(Testimony of Frank Alfred Williams.)

Q. Is that right? A. Yes, sir.

Q. Could the bail of the bucket fall that way toward the lip? A. No, I don't think so.

Q. It could just fall one way, toward this way (indicating)? A. Yes.

Q. Had the bucket just come down from unloading some coal when the accident happened?

A. Yes, sir.

Q. You went on the one o'clock shift, I understood you to say? A. Yes.

Q. And you loaded the bucket with coal and worked there for a while, sent out the buckets of coal, I mean, to have them unloaded?

A. Yes, sir.

Q. And the bucket had gone up and come back empty and you three men were taking it back again to load it up when the accident happened, is that right? A. Yes, sir. [117]

Q. Now, you said that you were back in the hold about how many feet under the edge of the coaming? A. You mean how far back we worked?

Q. Yes.

A. Between twelve and fifteen feet.

Q. You say that you got the bucket about half the distance in when the accident happened, is that correct? A. Yes, sir.

Q. After you loaded the bucket, did you generally turn it around after you got it loaded, or while still empty? A. While still empty.

Q. You turned it around while still empty?

A. Yes, sir.

(Testimony of Frank Alfred Williams.)

Q. And after it would get loaded—you would turn it around then get it loaded, then they pulled it out by hooking the hook on the bail, and then pull it out this way, isn't that what they did? A. Yes.

Q. And you remember those two ropes, Frank, one on each side near the lip up here, one on each side? A. No.

Q. You don't think there were any ropes there?

A. I don't remember any ropes.

Q. Have you ever worked at discharging coal before, as a longshoreman? A. Yes, sir.

Q. The same boat? A. No.

Q. Never worked on her before?

A. No, sir. [118]

Q. Frank, which side of the boat did the young fellow and Barney McHugh work on?

A. On the outside.

Q. What side?

A. I don't know what side it was—starboard or port.

Q. Left-hand side? You know which is your right and which your left hand?

A. Here is my left and here is my right (showing).

Q. Well, you worked on the left side of the boat, looking forward?

A. Worked on the right-hand side looking forward.

Q. You worked on the right-hand side looking forward? A. Yes, sir.

Q. You worked there all the time, you think,

(Testimony of Frank Alfred Williams.)

on the right side looking forward, during this evening, from after one o'clock?

A. We didn't work there all the time. We worked there that night.

Q. You used the same bucket all the time?

A. Yes, sir.

Q. How many other men were working in the hold together?

A. Well, there was eight men besides myself.

Q. Nine men altogether up to the time Barney got hurt, is that right? A. Yes, sir.

Q. Three men on each bucket? A. Yes, sir.

Q. And you kept one on the port side of the ship, another bucket amidships and another bucket on the other side of the ship, is that right?

A. Yes, sir. [119]

Q. Do you know how many buckets you would take out in an hour, Frank?

A. Never kept track of it.

Q. Would you take out more than one an hour?

A. Take out maybe a dozen; I don't know. I never kept track of it.

Q. Well, you think you may have taken out as many as a dozen an hour?

A. Maybe; maybe more.

Q. I mean your own bucket. You loaded your bucket and sent it up and reloaded it, you think, maybe a dozen times an hour, is that right?

A. No; not one bucket.

Q. How many times with your bucket?

A. I can't say just how many times.

(Testimony of Frank Alfred Williams.)

Q. You think as many as six times?

A. I don't know; I can't say. Might be one; might be six; might be a dozen. I don't know how many times it goes up.

Q. You think it would be less than five?

A. I can't say.

Q. That is the best you can say—maybe six, maybe a dozen, do I understand you correctly?

A. Maybe once.

Q. You think maybe only once?

A. I don't know; I can't say just how many.

Q. You mean to say it took—

Mr. WICKERSHAM.—(Interrupting.) I object, may it please the Court.

The COURT.—Objection sustained.

Mr. ROBERTSON.—I'll take an exception to the Court's ruling. [120]

Q. Now, Frank, how many buckets had you taken out before McHugh got hurt?

A. I never counted the buckets when they went up.

Q. Take out more than one? A. Yes.

Q. Take out more than two? A. Yes, sir.

Q. Take out more than three? A. Yes, sir.

Q. Take out more than four? A. Yes, sir.

Q. Take out more than five?

A. I don't know whether we did or not.

Q. You don't know that? A. No.

Mr. ROBERTSON.—I think that's all.

Redirect Examination.

(By Mr. WICKERSHAM.)

Q. Did you use the same bucket all the time?

(Testimony of Harry Gillis.)

A. Yes, sir.

Mr. WICKERSHAM.—That's all.

Testimony of Harry Gillis, for Plaintiff.

HARRY GILLIS, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name.

A. My name is Harry Gillis.

Q. How old are you? [121]

A. Oh, 34, going on 35.

Q. Where do you reside? A. Ketchikan.

Q. How long have you lived here?

A. I came up here in 1912.

Q. What is your business?

A. Oh, longshoring right at the present time—fireman by trade.

Q. How long have you been working in that business? A. Firing or longshoring?

A. Longshoring. Excuse me.

A. Oh, off and on for the last five years.

Q. Were you engaged in that kind of work in March, 1922, of a year ago? A. Yes, sir.

Q. What boat did you work on at that time?

A. Oh, the "Latouche," I think it was.

Q. The "Latouche." Did you work on the "Latouche" on the night of March 8 and the morning of the ninth? A. Yes, sir.

(Testimony of Harry Gillis.)

Q. What time did you go to work?

A. Oh, somewheres between one and two o'clock.

Q. Who was engaged in working with you, if anybody? A. Frank.

Q. Frank Williams? A. Yes, sir.

Q. The man who was just on the witness-stand?

A. Yes, sir.

Q. About what time did you go to work?

A. Oh, it was about one-thirty. [122]

Q. About one-thirty?

A. To be exact. Somewheres around there.

Q. What were you doing. A. Shoveling coal.

Q. What were you loading into? A. Buckets.

Q. A bucket. A. Yes, sir.

Q. What kind of bucket? A. Iron.

Q. Iron bucket? A. Or steel.

Q. Stand up and show the Court and jury about how high that bucket is or was.

A. Oh, about so (indicating).

Q. And about how large otherwise? How wide was it?

A. Oh, about so wide (indicating).

Q. And about how long?

A. About so long (indicating).

Q. Like this illustration on the blackboard?

A. That would be backwards.

Q. That would be backwards? A. Yes.

Q. Why do you say that would be backwards?

A. This thing here (showing) is on the wrong side.

Q. You mean this tripper is on the wrong side?

(Testimony of Harry Gillis.)

A. Yes.

Q. That is on the other side of the bucket?

A. Yes.

Q. Otherwise is it all right? [123] A. No.

Q. What else is the matter with it?

A. This thing (indicating) wasn't on it at all.

Q. Wasn't on the bucket that you worked with?

A. No.

Q. What had become of it?

A. I don't know, I am sure. Broken off, I suppose.

Q. There was no clutch, was there?

A. This thing is here (indicating), but this thing is gone here.

Q. You mean this handle was gone? A. Yes, sir.

Q. What was the effect of the breaking of that?

A. I am not sure.

Q. Do you know what shape the bucket was in that night, that bucket?

A. Well, it was a hay-wire rig.

Q. A hay-wire rig? A. Yes.

Q. What was there broken about it?

A. How is that?

Q. What was there broken about it—just that handle? A. Yes, sir.

Q. Do you know whether the tripper itself had tripped off?

A. Sure; tripped itself; sure.

Q. While you were there at work?

A. Yes, sir; yes, sir.

Q. Did you see it?

(Testimony of Harry Gillis.)

A. Sure; come pretty near spilling a lot of coal on me.

Q. How many wheels, if any, were there under that bucket? [124] A. Three, is all.

Q. How long did you work with it? A. Oh—

Mr. ROBERTSON. (Interrupting.) We object to that as incompetent, irrelevant and immaterial. This is all after the accident?

Mr. WICKERSHAM.—Yes, sir; immediately after the accident.

The COURT.—Objection overruled.

A. It wasn't over two hours at the most.

Q. Then what was done with the bucket?

A. We pushed it to one side.

Q. Did it trip while you were working with it?

A. Yes, sir.

Q. Just explain to the jury how that happened and how soon after you went to work.

Mr. ROBERTSON.—I object to that for the same reason—too remote.

The COURT.—Objection overruled.

Q. How long after you went to work did that happen?

A. The first time it happened was about half an hour after.

Q. What happened at that time?

A. Why, it spilled all the coal out of it.

Q. Where was it when it spilled the coal?

A. In the center of the hatch.

Q. How far up?

A. Oh, it didn't get off the ground at all.

(Testimony of Harry Gillis.)

Q. Well, was the wire cable attached to it when it spilled? A. Yes, sir.

Q. Was anybody touching it? [125] A. No, sir.

Q. What made it trip itself off, do you know?

A. Why, the catch.

Q. What was the matter with the catch?

A. Wore out is all.

Q. Did it do that again any other time that evening?

Mr. ROBERTSON.—The same objection.

A. Yes, sir.

Q. How soon? A. Oh, I can't swear.

The COURT.—Objection overruled.

Q. Well, within that two hours? A. Yes, sir.

Q. What did it do then?

A. It fell back and hit another man's foot.

Q. Who was he? Was he working with the bucket?

A. I don't know; I don't remember exactly who it was. Yes, sir.

Q. Where was he standing when he was struck?

A. Why, he was taking the bucket back to the coal pile.

Q. Why did the handle fall that time?

A. Oh, it come unhooked.

Mr. ROBERTSON.—The same objection.

The COURT.—Objection overruled.

Q. Did you examine that bucket carefully?

A. Sure.

Q. How long have you worked with buckets of that kind in unloading coal?

(Testimony of Harry Gillis.)

A. Oh, off and on for the last four or five years.

Q. Have you worked with many buckets like that?

A. Yes, sir; a lot of them. No; no, beg pardon. Wait. That [126] is my first experience with anything like that thing there.

Q. Have you worked with buckets of this type in good order?

A. Yes, sir; lots of them.

Q. Was that bucket in good order that night?

A. It wasn't; no, sir.

Q. Did you examine it carefully? A. Sure.

Q. You may state to the jury whether or not, in your judgment, it was a safe appliance, safe appliance to be used for that purpose that night?

A. It wasn't; no; no.

Mr. ROBERTSON.—Now, we object to that as incompetent, irrelevant and immaterial.

A. It wasn't.

Mr. ROBERTSON.—No proper foundation laid to qualify him.

The COURT.—Objection overruled.

Q. What did you do after the bucket was laid aside?

A. Shoveled coal. I shoveled coal into one of the other buckets.

Q. The men were divided up? A. Yes, sir.

Q. Did any of the men quit? A. No.

Q. They were divided up into two groups?

A. Yes, sir.

Q. Mr. Gillis, I wish you would tell the jury what

(Testimony of Harry Gillis.)

is the usual method that longshoremen handling coal in buckets as you were that night, follow in pulling a bucket back when it comes down to be loaded. Is there any particular way of doing it? [127]

Mr. ROBERTSON.—Now, wait. I object to that, if the Court please—

A. Yes, sir.

Mr. ROBERTSON. (Continuing.) On the ground that it is incompetent, irrelevant and immaterial. The usual way or custom among longshoremen wouldn't be sufficient to bind the defendant in this case if the way they used was in fact negligent.

The COURT.—Objection overruled.

Q. Just state if there is any usual custom; or how do you do it when the bucket comes down? What do you do with it?

A. There is generally a couple of lugs fastened on it.

Q. Where are they fastened on it?

A. Up at the lip.

Q. Were there any on this bucket?

A. Absolutely not; no, sir.

Q. Was there anything on this bucket to pull it with? A. No, sir; no, sir.

Q. Well, what do you do when a bucket comes down and you want to get it back to the coal pile?

A. Push it back.

Q. Push it back? A. Yes, sir.

(Testimony of Harry Gillis.)

Q. Does it make any difference whether you push this end forward or that end (showing)?

A. It don't make any difference on a good bucket; no.

Q. Were there any rollers under this bucket?

A. Yes, sir.

Q. Are the rollers put on there so that you can push it either [128] forward or backward?

A. Yes, sir.

Q. But not sidewise? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. If the bucket is in good order and this safety clutch is in good order, will the handle stand up whether you push it forward or backward?

A. Sure.

Q. Well, I ask you if it is just as safe one way or— A. (Interrupting.) Yes, sir.

Q. So that if the safety clutch is in order—

A. (Interrupting.) Yes, sir; turn it upside down and you can't unhook it.

Q. If the safety clutch is in shape?

A. Yes, sir.

Q. Was that safety clutch in good order that night? A. No, sir.

Q. Was that why it fell?

Mr. ROBERTSON.—Oh, I object to that as leading.

The COURT.—Objection sustained.

Mr. ROBERTSON.—He has led the witness all the way through. Witness is entirely—

(Testimony of Harry Gillis.)

The COURT.—Strike out the last answer and question.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.) [129]

Q. Even on this tub that you are speaking of the bail couldn't fall toward the lip, forward toward the lip, could it? A. No, sir.

Q. The only way the bail could fall would be towards the rear of the tub, is that not correct?

A. Yes, sir.

Q. Now, on this tub, with this portion, the handle part of the tripper gone, how was the tub dumped? How did you dump the tub?

A. I don't know how they dumped it up there.

Q. You don't know?

A. Because I wasn't up on the hopper.

Q. Well, now, when it came back to you down in the hold, after it had been unloaded and came back down, you and the two men who were working with you would run it back up to the coal pile and load it up again, would you not? A. Yes, sir.

Q. Would you turn it around before you loaded it or after you loaded it?

A. Before we loaded it, of course.

Q. Well, now, when you turned it around, then did you take the bail down? A. Yes, sir.

Q. How did you unfasten the bail then so as to get the bail down? A. Just lift it up.

(Testimony of Harry Gillis.)

Q. You lifted it up? A. Yes, sir.

Q. This little thing that went over the catch?

[130] A. Yes, sir.

Q. The sort of trigger that went over the hatch?

A. Yes, sir; that's all there was to it.

Q. Is that the only way it could be lifted up?

A. Sure.

Q. The only way the bail could be made to come down? A. Yes, sir.

Q. When it went up loaded, was there anything put on that so that the man on the hopper could unload it in any other way? A. No, sir.

Q. That is the way it went up? A. Yes, sir.

Q. Now, then, did you look at the other two tubs there? A. Yes, sir.

Q. Were you working down there in the hold that night? A. Yes, sir.

Q. And the other two tubs had lugs on the lip?

A. What is that?

Q. The other two tubs had lugs on the lip?

A. Yes, sir.

Q. But this tub didn't? A. Yes, sir.

Q. You are quite sure of that?

A. Quite sure; yes, sir.

Q. And this one out of the three didn't have them? A. Yes, sir.

Q. And you continued to use the tub there for something like two hours, is that correct?

A. Oh, it might not have been over an hour and a half. [131]

Q. Well, I just wanted to know about the time?

(Testimony of Harry Gillis.)

A. Yes, sir.

Q. How many tubs of coal during that time did you send up—how many loads?

A. I can't swear to that.

Q. Well, you have had considerable experience as a longshoreman? A. Yes, sir.

Q. Discharging coal, shoveling coal into tubs and all that, haven't you? A. Yes, sir.

Q. About how many tubs do you average an hour, a crew of three men?

A. Oh, the best we can do is about six an hour.

Q. About six an hour? A. That is the best.

Q. Is that about what you were averaging that time? A. I think so.

Q. What wings of the ship were you working in?

A. I was working on the far side.

Q. You were working on the far side?

A. Yes, sir.

Q. On the port or starboard wing?

A. Starboard, I think it was.

Q. Your recollection is that you were working on the starboard wing?

A. I think so, if I am not mistaken.

Q. Well, starboard is on the right-hand side, looking forward, isn't that right?

A. That is right. [132]

Q. Wasn't it on the port side, left-hand side, looking forward? A. No; absolutely not; no sir.

Q. You are sure it wasn't on the port side, but was on the starboard side?

A. Yes, sir; positively sure.

(Testimony of Harry Gillis.)

Q. Pardon me? A. Positively sure it was.

Q. When you went on shift at about, I think you said you went on shift somewhere between one and two o'clock? A. Yes.

Q. That would be in the early morning?

A. Yes, sir.

Q. You hadn't been on the shift, working on the ship prior to that time?

A. Absolutely not. I finished her up, though.

Q. How is that? A. No, but I finished her up.

Q. You worked the following day until that noon, when you discharged the entire cargo?

A. Yes, sir.

Q. I understood you to say, Mr. Gillis, that you called this a hay-wire contrivance. Is that what you call it? A. Hay-wire rig; sure.

Q. Pardon me. A. Sure.

Q. What do you mean by that?

A. Why, it didn't work right.

Q. You mean there was some hay-wire on it?

A. No. [133]

Q. Oh, that is just to describe it? A. Yes, sir.

Q. Due to the fact that you claim that this part of the tripper that is, the handle of the tripper, was off? A. Yes, sir.

Q. That is what you mean by "hay-wire" contrivance? A. Yes, sir.

Q. There was no hay-wire on it, though?

A. Absolutely not; no, sir.

Q. Mr. Gillis, when the tub is loaded with coal

(Testimony of Harry Gillis.)

and suspended on the hook from the tackle and all that— A. Uh-huh.

Q. (Continuing.) Do you know whether or not that throws a strain on this little latch so as to hold it down over the catch? A. I don't know.

Q. You don't know about that? A. I don't.

Q. What was it held it up in place, Mr. Gillis?

A. Held what up in place?

Q. That held the bail in place, going up on those various loads that they did carry the coal up?

A. Why, the catch, of course.

Q. The catch held it? A. Yes, sure.

Q. The catch held it? A. Sure; grabbed it.

Mr. ROBERTSON.—That's all.

Redirect Examination.

(By Mr. WICKERSHAM.) [134]

Q. Did I ask you if there was any becket or rope attached to this to pull it by?

The COURT.—Yes.

A. No.

Q. Oh, you answered that. Was there any iron hand-hold on the side of it to pull it back?

A. No, sir.

Q. What is it? A. Not to my knowledge; no.

Recross-examination.

(By Mr. ROBERTSON.)

Q. You don't recall that, Mr. Gillis?

A. No, sir.

Mr. ROBERTSON.—That's all.

Testimony of Alvin Soderberg, for Plaintiff.

ALVIN SODERBERG, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What is your name? A. Alvin Soderberg.

Q. Mr. Soderberg, how old are you?

A. Thirty-one.

Q. How long have you resided in Alaska?

A. Off and on since 1912.

Q. What is your business or occupation?

A. Well, follow almost anything; usually fishing.

Q. Where were you working in March, a year ago? [135]

A. Well, I was employed off and on on the docks down here.

Q. What were you working at there?

A. Longshoring.

Q. Do you remember having worked on the "La-touche" at any time? A. Yes, sir.

Q. Do you remember who was working there with you at any time?

A. No; they were all strange people to me.

Q. What?

A. They were all strange people to me.

Q. Did you ever work there with Barney?

A. I seen Barney work there; yes.

Q. Where did you work?

(Testimony of Alvin Soderberg.)

A. I worked down in the hold.

Q. What were you doing on the "Latouche"?

A. Shoveling coal.

Q. Were you working there on the night, about March eighth or ninth? A. Yes.

Q. Do you remember that any one was hurt there that night? A. Yes, I do.

Q. Who was hurt? A. Barney McHugh.

Q. Were you present when he was hurt?

A. Yes, sir.

Q. Just tell what, if anything, you saw of that matter?

A. Well, I *seem* the bail come down. They was pushing it back into the hatch coaming and it fell on a part of his leg.

Q. What happened when he was hurt?

A. Well, he groaned and hollered and sat down and after a while, somebody helped him up. [136]

Q. What became of him?

A. Well, I don't know. I guess they took him to the hospital, or something.

Q. Did you examine the bucket that he was working with that night?

A. I seen it, took a look at it first when I came down into the hold.

Q. What time did you first come down there?

A. One o'clock.

Q. How long after you came down there before Barney was hurt?

A. Oh, I suppose it was, oh, half an hour—little more probably.

(Testimony of Alvin Soderberg.)

Q. About half an hour. You say you examined the bucket?

A. Well, I didn't make much of an examination, but I took a look at it.

Q. Just tell the jury what was wrong with the bucket, if anything.

A. Yes. It was an old, worn-out bucket. You could see it was no good, and I told the fellow that I was working with, "You better get away from that. It doesn't look good to me," because I had been handling quite a few buckets.

Q. Where was it broken, if at all?

A. Well, it was the lever part.

Q. Come right over to this illustration.

A. This here (indicating) was all bent out of shape in the first place and there was some attachment up here (including) missing. The lever here was all broken and bent out from the sides here. Instead of falling on the side, it was bent out and then there was some attachment up here missing. [137]

Q. What effect would that have upon the usefulness of the bucket?

A. The bucket wouldn't be safe. You couldn't depend on the becket. If that rig was in proper shape, the becket would hold it there. There was no chance so long as the becket was there, for it to trip.

Q. How long have you worked at the longshoring business?

(Testimony of Alvin Soderberg.)

A. Well, I never worked particularly as a long-shoreman, but I have been employed as a sailor.

Q. How long were you employed as a sailor?

A. Oh, I guess, probably I was in the service about nine months, for the Alaska Steamship Company.

Q. What boats did you work on?

A. I worked on the "Latouche," "Skagway" and on the "Alaska."

Q. Were you conversant with the character of these buckets on the "Latouche"? A. Yes, sir.

Q. And had you ever worked with that sort of buckets before? A. Yes, sir.

Q. How long have you been acquainted with that class of buckets?

A. Oh, different times, I was on the "Latouche" two or three months—four months, and on the "Skagway" three or four months.

Q. Now, from your examination of that bucket that night and from the actions that you saw it performing, was it or was it not a safe appliance for handling coal? A. It was not.

Q. And—

Mr. ROBERTSON.—I object to that. No proper foundation laid. [138] He hasn't been qualified as an expert, to answer that question.

The COURT.—I think you better question him further and see whether he is an A. B. seaman.

Q. How much work have you done around those buckets in the hold of vessels, in unloading coal?

(Testimony of Alvin Soderberg.)

A. Oh, I worked on them approximately six or seven months anyway.

Q. And was that six or seven months long enough to enable you to get acquainted with the mechanism of that bucket? A. Should be.

Q. Well, was it?

A. Well, yes; I should think it was.

Q. Were you or were you not acquainted with the mechanism of this bucket?

A. Sure, I was. At least, I thought I was.

Q. Well, then, I'll renew my question as to whether or not this bucket, that night, as it was being used by Barney and these other people at that time, was a safe appliance.

A. No, sir; it was not a safe appliance.

Mr. ROBERTSON.—The same objection.

The COURT.—Objection overruled.

Q. How many times, if more than once, did you see that fail fall?

A. Oh, I seen it fall—

Mr. ROBERTSON.—Wait a minute. I object to that, if the Court please, unless the time is fixed.

The COURT.—Yes.

Q. Well, that night, at or about the time Barney was hurt. [139]

A. I seen it fall three different times at least.

Q. Was any one else hurt with it?

A. There was another man hurt about half an hour later on, probably an hour and a half.

Q. How was he hurt?

(Testimony of Alvin Soderberg.)

Mr. ROBERTSON.—Now, I object to that, if the Court please.

The COURT.—Objection overruled.

Mr. ROBERTSON.—Incompetent, irrelevant and immaterial and not a part of the *res gestae* of this case.

Q. Go ahead.

A. He was hurt by the—

The COURT.—(Interrupting.) Now—

Q. How was he hurt?

A. The same way as Barney, only I think the bail took him farther up on the leg. They got this man out of the hold and I seen him a couple days after. He was limping around; and I have seen him since.

Mr. ROBERTSON.—I move to strike all that. That is no part of the answer.

The COURT.—All that latter part may be stricken.

Q. You say you have worked in taking out coal from boats of this kind? A. Yes, sir.

Q. Before? A. Yes, sir.

Q. How much experience have you had in taking the bucket down and placing it in a boat of that kind?

A. Oh, after you have been working, you have a little experience in taking them down. [140]

Q. Just tell the jury how you managed to get the bucket in place to fill with coal?

A. Well, the first thing we do— It depends on the condition of the coal and where you are work-

(Testimony of Alvin Soderberg.)

ing. If the bucket is loaded right down in the hold, you let the winchman drop it close to this and then you take the bucket and get it in position wherever you want it.

Q. Is there any rule or custom about which side of that bucket should go forward in pushing it back under the hatch? A. No; no.

Q. If it is pushed back with the back towards the coal, do you always turn it around?

Mr. ROBERTSON.—Well, now; I object to that as very leading.

Mr. WICKERSHAM.—That is exactly what I want to know.

The COURT.—You might change your question.

Q. Is there any rule about turning that around when you get back to the coal?

A. No; there is no such thing as a rule.

Q. But when you go to take it out from under the hatch, how do you get it out?

A. You have to lower the bail down and pull it out and when you get it into position, put the bail up again and hoist it out.

Q. What are these wheels on here for?

A. To shove it back there.

Q. Are those wheels so arranged that you can shove the bucket wither backwards or forwards?

A. Either way; yes.

Q. What was there on this bucket, if you know, to pull it by?

A. There was nothing on it to pull it by.

(Testimony of Alvin Soderberg.)

Q. Was there any rope or becket or anything attached to it to [141] pull it by? A. No.

Mr. ROBERTSON.—I object to that as leading.

The COURT.—Objection overruled. He has already answered.

Q. Well, what was there on that bucket to pull it by?

A. There was nothing on the bucket itself. You would have to get hold of the bucket the best way you could; but there was no rope attached to it.

Q. Were there any handholds on there?

A. No; the handles were not there.

Q. They were not there?

A. They were not there and I looked at it and I told the fellow that I was working with to get away from this. I says—

Mr. ROBERTSON.—(Interrupting.) Well, now, wait. I don't think that is a part of the answer—what he told somebody else.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Mr. Soderberg, what time did you go to work there that evening? A. One o'clock.

Q. Had you been working the previous evening?

A. No, sir.

Q. You went on shift at one o'clock in the morning? A. Yes, sir.

Q. And then you worked until the vessel was discharged about noon that day, is that correct?

A. Yes. [142]

(Testimony of Alvin Soderberg.)

Q. What other men were working on the same buckets that you were working on?

A. There was a man by the name, I think, of Swa—, if I ain't mistaken.

Q. Swa—?

A. I wouldn't say his name was so, but I think it was, so far as I can recollect, and the other fellow was a stranger completely to me. They were both strangers to me, so far as that goes.

Q. You were not working on the same bucket that McHugh was working on, is that correct?

A. No, sir.

Q. Which wing of the ship were you working in? A. I was on the port side of the ship.

Q. Which side? A. Port side.

Q. You were working on the port side?

A. Yes.

Q. You say you did go over and look at that bucket of McHugh's. When did you first go over to look at it?

A. I just took a look at it when I first came down the hold, the first time. There was no chance to look at it after that.

Q. When you first came down, it was one o'clock, is that what I understood you to say? A. Yes.

Q. And at that time, what was it you told that fellow?

A. I told this fellow that he better take another bucket. I said, "Better take another bucket. That bucket doesn't look good to me." [143]

Q. What fellows did you tell this to?

(Testimony of Alvin Soderberg.)

A. I told this fellow, I think his name is Swa—, but I don't know.

Q. Where were the other men then?

A. They were just coming down the hold then.

Q. They were all coming down the hold at that time? A. Yes.

Q. Did I understand you to say that the handle of the tripper was gone?

A. No; it was not gone completely.

Q. It was there, but bent out, is that it?

A. Bent out; yes. Well, a part of it was missing, up towards the catch.

Q. Up in here, you say? A. Yes.

Q. There was something gone? A. Yes.

Q. But this part (indicating) was there?

A. Yes.

Q. Is that what I understood you to say?

A. Yes.

Q. Now, when the bucket is loaded, Mr. Soderberg you pull it out ordinarily from underneath the coaming of the hatch by hitching it on to the tackle; that is you put a hook in here (indicating) that is on a cable and pull it out that way?

A. Yes.

Q. I mean, with the cable attached to the winch? A Yes. [144]

Q. Do you turn the bucket around before you do that? A. No.

Q. You mean that the cable— How is it pulled out, then?

A. You can pull it out with the bail down.

(Testimony of Alvin Soderberg.)

Q. That is, you lift the bail down this way (indicating)? A. Yes.

Q. And pull it out this way? A. Yes.

Q. Pull it out backward? A. Yes.

Q. Well, when you turn it around, how do you do it?

A. You have to turn it around when you do that.

Q. You have to turn it around to do that?

A. Yes.

Q. And you ordinarily do turn it around, so that it can be done, is that correct?

A. Why certainly.

Q. And this particular bucket, when you went over and looked at it as you were first down there, at that time were all three buckets down at the bottom of the hatch? A. Yes.

Q. And you went over and picked out the bucket that you and the two men you have mentioned were working with? A. Yes, sir.

Q. Is that it? A. Yes.

Q. And you picked out what you thought was a pretty good bucket and started to use it?

A. Certainly. [145]

Q. Did you ever again have occasion to use this other bucket that you are thinking about? A. No.

Q. How about the other bucket. You used one and there was *sti* a third bucket. Did you examine that bucket, too? A. How is that?

Q. I say, there was still a third bucket.

A. Yes.

Q. Did you examine that bucket, too? A. No.

(Testimony of Alvin Soderberg.)

Q. You didn't examine that?

A. I took a look—I might have taken a look at it.

Q. Just took a glance at it? A. Yes.

Q. And you picked out what you considered to be a good bucket and you took the two men with you and went ahead and went to work, is that it?

A. Sure.

Q. On this third bucket, did that have beackets and the handles on it? A. Yes.

Q. The third bucket you remember that had them on?

A. At least, I never saw anything wrong with the third bucket.

Q. You never saw anything wrong with it?

A. No.

Q. And the bucket that you used had beackets and handles on it? A. Yes.

Q. And the one that McHugh used, you don't recall whether or not that had beackets and handles on it? [146] A. It had beackets on; yes.

Q. It did.

A. But it did not have handles for pulling it.

Q. Had the beackets for what?

A. For moving it over.

Q. It didn't have this becket on it here (pointing)? A. Yes.

Q. The bucket that McHugh had had beackets attached to the trigger?

A. There was a piece of rope there anyhow.

Q. By becket you mean the piece of rope that is

(Testimony of Alvin Soderberg.)

attached to the end of the trigger and goes over a little projection that sticks out here (indicating); is that correct? A. Yes.

Q. That is the projection which, when the bail comes over or when the tub is dumped, goes up and strikes the bail, isn't that right? A. Yes.

Q. Sticks out there perhaps two or three inches? A. Yes.

Q. And you remember that that becket was on there? A. Yes.

Q. But you don't recall as to whether or not the becket was on up here (indicating). Is that right? A. No.

Q. And you don't also recall as to whether the handles was on up there, is that correct? A. That is.

Q. Did you know Barney McHugh at that time?

A. No, sir. [147]

Q. Had you ever done longshoring with Barney before that? A. Never did.

Q. Was that the first occasion you had done any longshoring here in Ketchikan?

A. Yes; the first occasion.

Q. And prior to that where had you done longshoring? A. Well, fishing.

Q. Pardon me?

A. What did you say? I didn't hear you.

Q. Prior to that where had you done longshore work?

A. Well, off and on in the vessels; do all the longshoring work there is in the Alaska vessels.

(Testimony of Alvin Soderberg.)

The COURT.—You are a sailor, aren't you?

The WITNESS.—Yes, sir.

The COURT.—A. B.?

The WITNESS.—Yes, sir.

The COURT.—Able-bodied seaman.

The WITNESS.—Yes, sir.

Q. As I understand you, you have been on vessels in these waters? A. Yes, sir.

Q. Were you working for the Alaska Steamship Company? A. Yes; I have.

Q. They used coal buckets, self-dumping buckets, isn't that correct? A. Yes, sir.

Q. Now, then, when the bucket is loaded and being taken up through the air, Mr. Soderberg, and is suspended from the end of the cable that goes to the winch, does any strain come on the bail to cause it to press this sort of latch, or whatever you call it, down over that little catch? [148]

A. Yes; it puts some pressure on it there. I don't know just what you would call it; weight of it would press it down; that is, it fits in quite well.

Q. On this particular tub that Barney was working on, you never had occasion to unfasten the bail, did you? A. No.

Q. To trip the bail? A. No.

Q. When you went down there at one o'clock, Mr. Soderberg, and examined that bucket, the fact that the bail—I don't mean the bail, but that the handle of the tripper was bent out that way and this other piece gone, was very evident to you, was it not? A. Why, sure.

(Testimony of Alvin Soderberg.)

Q. That is to say, there was nothing about it that you couldn't readily see, was there?

A. No; it didn't look good to me.

Q. Yes; as soon as you saw it, you could detect that there was something wrong with it?

A. Why, sure.

Q. It was plainly evident that there was something wrong with it?

Mr. WICKERSHAM.—Well, now, I think he stopped me for asking leading questions.

The COURT.—This is cross-examination.

Mr. WICKERSHAM.—Yes; I know it is.

The COURT.—He can answer.

Mr. WICKERSHAM.—I think the witness didn't understand. [149]

The COURT.—What was the answer?

(Answer repeated by reporter.)

Q. There is nothing about those tubs there, or is there, Mr. Soderberg, that can't be seen easily—that is to say, there is no concealed mechanism about them in any way?

A. No; no.

Q. Except that in the case of this rear wheel on the back, it would be a little difficult to see that?

A. Yes.

Q. But all the rest of it is plainly visible—all the mechanism of the tub? A. Yes.

Mr. ROBERTSON.—That's all.

(Whereupon adjournment was taken till 10 A. M., March 27, 1923.)

Tuesday, March 27, 1923,

Court met pursuant to adjournment at 10 A. M.

Testimony of Val. Klemm, for Plaintiff.

VAL. KLEMM, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name to the jury please.

A. My name is Val. Klemm.

Q. How old are you? A. Forty-four.

Q. Where do you reside? A. Ketchikan.

Q. How long have you resided in Ketchikan?

A. Twenty-one years. [150]

Q. What is your business or occupation?

A. Well, I am a miner, but then I do a little longshoring once in a while.

Q. About the month of March, a year ago, what was your occupation?

A. Well, I was longshoring then.

Q. Where?

A. Down on the "Latouche." Well, I wasn't on the boat; I was up on the bunker.

Q. Here in Ketchikan? A. Yes; right in the—

Q. (Interrupting.) You say you worked on the "Latouche"?

A. Not on the boat. I worked up in the bunker, dumping the buckets.

(Testimony of Val. Klemm.)

Q. About the eighth or ninth day of March, where were you working?

A. Well, I don't know the exact dates. I wouldn't remember.

Q. About what time in March were you working there on the "Latouche"?

A. Well, I was working there when there were one or two accidents happened there. I don't know exactly what date it was now.

Q. Do you know the plaintiff here, Barney McHugh? A. Yes, sir.

Q. Do you remember the incident of his being hurt there at one time?

A. Well, I know when I saw them help him out of the hold.

Q. Were you working there at that time?

A. Yes, sir.

Q. Now, tell the jury where you were working.
[151]

A. Well, I was working up in that hopper, right up on top of the dock there.

Q. What were you engaged in?

A. I was supposed to see that the bucket got right square over the hopper and then dump it.

Q. You were dumping the buckets, in other words? A. Yes, sir.

Q. Where were these buckets coming from?

A. Coming out of the hold.

Q. What were they loaded with? A. Coal.

Q. Out of the hold of the "Latouche"?

A. Yes.

(Testimony of Val. Klemm.)

Q. And it was loaded with what? A. Coal.

Q. When did you go to work at that time?

A. I started in after midnight; that is, at one o'clock, I think.

Q. How soon after that do you recall that this plaintiff was injured?

A. It was less than an hour after I went to work. I don't know exactly how long it was.

Q. What did you see of him that night?

A. All I saw of him was when one or two men were helping him out of the hold. He was hopping on one foot—couldn't stand on the other one.

Q. Did you see him come up on the deck, or the dock?

A. I saw them helping him out of the boat; then they took him in a car, took him to the hospital or to the doctor. I don't know where they took him because I had to stay right there [152] at the hopper.

Q. How many buckets were being used at that time? A. I think three.

Q. Three. I wish you would step down here and look at this illustration on the blackboard and see if you can tell what that represents?

A. Well, that looks to me like the buckets they used.

Q. How high were those buckets?

A. Oh, I don't know. Probably that high (showing).

Q. Three and a half, four feet?

A. Not four feet, I wouldn't say.

(Testimony of Val. Klemm.)

Q. Three feet?

A. Probably three feet, or better than three feet.

Q. And about how wide?

A. I don't know. They were around three feet, I guess.

Q. How long?

A. They were a little longer one way on the top there than they were the other way; probably four feet anyway.

Q. What does this (indicating) represent?

A. That is the side that you are supposed to dump with.

Q. And this object marked here, what is that?

A. That is the bail.

Q. What is that bail constructed of?

A. That's pretty good-sized iron or steel; pretty heavy.

Q. What is the bucket constructed of?

A. Steel, I presume; iron.

Q. And the bail, you say, is constructed of iron?

A. Iron or steel. I couldn't tell you.

Q. How large is that iron or steel? [153]

A. Probably one to two. I wouldn't be exact about that, though.

Q. Tell the jury how that bail is arranged there so as to enable the bucket to be tripped?

A. There is a kind of a, kind of a square like that (showing) that is probably an inch and a quarter wide and maybe quarter-inch iron, but it is made square; then there is a lip comes down on that, and you work that lever (showing). This here square

(Testimony of Val. Klemm.)

hole hooks over the pin and that holds it from dumping, and when you dump it, you have to haul on that lever and then take hold of the bucket at the same time, or it will go the wrong way on you.

Q. How long have you worked on this longshore business?

A. Oh, I have done that, off and on, for a good many years. I have done that back on the Lakes, when I was a small boy.

Q. Yes.

A. That is, not steady, but I done longshoring a good deal.

Q. How much work of that kind have you done with this sort of bucket in Alaska, in Juneau or in Ketchikan?

A. I have dumped hundreds of them in Ketchikan—hundreds of them. I done that off and on ever since I have been here. When things were slack and I wanted to make a little extra money, I would go down to the dock when a boat came in and I would pick up a dollar or two.

Q. You say there were three buckets being used?

A. Yes, sir; there was one on each side and one in the middle in the hold.

Q. Did you notice those buckets pretty carefully that night while you were dumping them to see if they were all right or not? [154]

A. I noticed one of them. One of them dumped before it ever got out to the hopper where I was working.

Q. What caused it to dump?

(Testimony of Val. Klemm.)

A. Well, I don't know, unless it was on account of that tripper being broken. It dumped before it ever got to me and there were lumps of coal flying all over, dropped down on the deck overboard and everywhere.

Q. How many of those buckets were out of order in that respect?

A. Well, there was only one that I noticed.

Q. I wish you would tell the jury as nearly as you can what was the matter with that? What caused it to act that way, if you know?

A. Well, it seemed to me that that lever was broken off—that lever down there.

Q. Can you show the jury what you are talking about?

A. It seemed to me that that lever was broken off, because the other two had a little line tied through that hold there—quarter-inch line and then there was an instrument on that and it hooked over a pin here (indicating); but on this one it was broken off; you couldn't fasten it that way. There was nothing to fasten it to, and whenever that bucket would come up and I would have to dump it, I had to take hold of this here (indicating) with my hand and shove up on it, because there was nothing for me to get hold of. I couldn't get—I had to shove this one up that way. There was nothing to take hold of, because it was broken.

Q. Mr. Klemm, from your experience as a dumper of these buckets and from your examination of that particular bucket that night, I will ask you

(Testimony of Val. Klemm.)

as to whether or not it was a safe [155] appliance to be used in that class of work.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial.

A. Well, I wouldn't think so.

The COURT.—Wait a minute. He may answer. Objection overruled.

A. I wouldn't think it was safe, because there was no way of holding that, because there was no way of holding that, because, for illustration, I think it was the first or second bucket that come out of the hold—you hoist the bucket out and give it a kind of a swing, you know. The winch driver did. You know, he wasn't kind of careful enough; he kind of jerked it a little bit and the bucket was going back and forth enough to throw that little tripper up and it tripped. The bucket dumped itself before it ever got out to me.

Q. If this handle had been tied to this peg that you speak of with the usual lanyard or string, would it have done that? A. No; I don't think so.

Q. No.

A. I don't see how it could.

Q. What was there on this bucket by which it could be handled or pulled around?

A. I don't know. I don't know if there was anything on it. I usually grabbed hold of the edge of the bucket when it come in to steady it.

Q. Yes.

A. I didn't notice anything on it. There might

(Testimony of Val. Klemm.)

have been something on it. I don't know. I wouldn't say.

Q. Were there any ropes on it, or anything?
[156]

A. I don't know.

Mr. ROBERTSON.—Now, we object to that as leading.

Mr. WICKERSHAM.—And I am going to continue to ask him that if the Court—

Mr. ROBERTSON.—We certainly object to it as leading.

Mr. WICKERSHAM.—If counsel will sit down and not get excited—

A. (Interrupting.) Well, I didn't notice any ropes on it. They may have been on there, or they may not. I never used them. I would just take hold of the edge of the bucket.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Mr. Klemm, do I understand that you are the hopper man that went on shift at one o'clock?

A. Yes, sir.

Q. Did you have occasion yourself to go down to the hold of the ship?

A. No, sir; I had no business there.

Q. And your business was solely confined to the work up on the hopper?

A. Absolutely. I had no business off of that hopper.

(Testimony of Val. Klemm.)

Q. You know how many men were working down in the hold? A. I couldn't tell you.

Q. Do you know how many tubs were working in the hold? A. Yes; there were three.

Q. How do you know there were three working in the hold?

A. Because I know they would take one from one wing and then they would take one out of the center and then the other [157] out of the other wing; so there must have been three gangs down there and three tubs.

Q. Could you see that?

A. Yes, I could, from where I was. I was above the hold of the boat. You could look right down into the hold.

Q. From where you were, twenty-five or thirty feet away, was there sufficient light for you to see down into the hold and to see that there was a gang—

A. (Interrupting.) There was plenty of light in the hold, but there was no light between me and the hold except a lantern hanging behind me.

Q. There was no light by you except a lantern?

A. A lantern behind me on the coal bunker; that's all.

Q. Now, then, what was your ordinary custom in dumping the buckets after they got up to you on the hopper? Will you explain that again. How do you dump them?

A. You unhook that little rope on there (indicating).

(Testimony of Val. Klemm.)

Q. This rope here (pointing)? A. Yes.

Q. This rope is leading from the end of the trigger and over here, what is that?

A. Oh, that's the pin. That's the pin; you unhook that rope and pull the lever and that lets go of the pin here (indicating) this here, in that way (showing). Well, then, when you lift it this way, why the bucket will unhook this pin (indicating). This will unhook this pin, this dog or whatever you call it, then you can swing your bucket, balance it and dump it.

Q. What did you do—give that thing a little tug, kind of a little tug when you trip it? [158]

A. No; I do not. All you have to do is to move that lever.

Q. You have got to move the lever over?

A. You have got to pull it a little bit.

Q. With a rope?

A. No, not with a rope. You don't use a rope at all.

Q. You don't use a rope at all?

A. No; not in dumping it.

Q. You take hold of the tripper and put that down (indicating)? A. Yes.

Q. Move that way? A. Yes.

Q. How much coal about did the buckets hold?

A. I don't know. I didn't weigh any.

Q. What is the usual amount of coal taken out in a tub of that kind—about a ton, three-quarters of a ton?

A. No; I don't think they hold that much; prob-

(Testimony of Val. Klemm.)

ably eight, nine hundred pounds. I'm just guessing at it.

Q. I see. Well, you think it is at least that much, don't you?

A. Well, I don't know about that. It may be less than that.

Q. It might be even less than eight or nine hundred pounds?

A. Yes; and it may be a half a ton. It may be anywhere from five hundred to half a ton.

Q. Now, then, when the bucket is suspended in the air, there is a hook up here on the bail (indicating), isn't there?

A. Yes; there is an eye in the bail up there, and there is a hook of the winch, of the cable hooks in that.

Q. And the weight is suspended, is it not, on that; that is, it hangs down, the whole weight is suspended from this hook, isn't it? [159]

A. I would think so. When it hangs in the air, everything is hanging off that hook.

Q. I see. At that time does the bail bring any pressure to bear down on this little place here (indicating), down on this catch? A. I don't know.

Q. You don't know?

A. No; I don't know. That's too deep for me?

Q. That's too deep for you? A. Yes.

Q. And when the tub got out to you, this particular tub, you simply shoved up on your hand and pushed up?

(Testimony of Val. Klemm.)

A. Yes; there was no lever there to take hold of. I take and lift it up with my hand.

Q. Yes; I see.

A. I put my weight against the bucket to straighten the bucket up. If there was too much coal on one side of the bucket, I would have to put my weight against it; otherwise she would come up even. If it wasn't loaded about even, then I would just move it by hand, keep my hand on it all the time to keep it from going the wrong way.

Q. You had to lift up with your hand; you had to take the swinging bucket and endeavor to balance it so as to loosen the catch, is that what you mean? A. No.

Q. Is it then you shove up with the other hand?

A. Yes, if it is overbalanced one way, you would have to; yes.

Q. If it is overbalanced which way, Mr. Klemm?

A. Well, let's see—well, anyway I guess. [160]

Q. If it is overbalanced any way—if it is too much any way, there would be some pressure on that, I would think. I don't know, though. I'm just asking you what—

A. (Interrupting.) I can't remember everything a year ago. I haven't worked on one of those coal buckets since.

Q. You have had a lot of experience before this, but you haven't worked with one of those coal buckets since?

A. I haven't handled any coal since that time.

(Testimony of Val. Klemm.)

Q. Now, then how fast did the buckets come up that night? A. Well, I don't know.

Q. About how frequently did the buckets come up to you on the hopper?

A. Come up, one in less than every five minutes, I should think one every five minutes at least.

Q. At least one every five minutes?

A. Or less than that.

Q. Somewhere in the neighborhood of twelve buckets an hour?

A. I don't know exactly how many. I didn't have no chance to count them.

Q. But you say at least one every five minutes. Is that correct?

A. Well, no that isn't correct, because, as I say, I didn't time them.

Q. I know you didn't time them—

A. (Continuing.) I don't know; perhaps they come up every five minutes and then maybe there would be ten or fifteen minutes between the tubs.

Q. Between the tubs? A. Yes.

Q. How many— [161]

A. (Continuing.) Maybe longer.

Q. How many tubs came up before McHugh was hurt?

A. Well, there wasn't more than four or five, I don't think.

Q. There wasn't more than four or five?

A. No, there wasn't very many; probably there was six or seven, but I don't think there were any more than that.

(Testimony of Val. Klemm.)

Q. You don't think there could possibly have been eight or nine?

A. No; I don't think so. I think he got hurt before there were that many come out. I would be sure of that.

Q. Up where you were working on the hopper, it was quite dark, was it?

A. Well, we had a lantern up there behind us.

Q. Just an ordinary coal oil lantern?

A. Common coal oil lantern.

Q. How far was that sitting away from you?

A. Oh, probably—maybe four or five feet.

Q. Pardon me.

A. There was a stake nailed up there and it was hanging on the nail on that stake.

Q. Was that all the light you had?

A. That was all the light I had to see the bucket. That was just enough to show me which side of the bucket the tripper was on and how to handle the bucket. That was all.

Q. In that light, you had no difficulty in finding out the defect in this tub?

A. I could find that out if I had no light at all. I could feel that.

Q. You could feel that?

A. There was no way to hook it on. [162]

Q. I see. In this instance, are you testifying from what you saw or what you felt?

A. I am testifying from what I saw.

Q. Well, then, there was light enough for you to see? A. Yes.

(Testimony of Val. Klemm.)

Q. You could see to testify? A. Yes, sir?

Q. That is correct? A. Yes, sir.

Q. How old were you when you were a small boy operating one of those buckets on the lakes?

A. I never operated one of those coal buckets on the lakes. I was about seventeen years old when I was longshoring.

Q. You were longshoring when you were seventeen years old, but not operating tubs?

A. No; not on the coal boats.

Q. You didn't do any of that work until you came to Ketchikan? You didn't handle coal buckets until you came to Ketchikan, is that right?

A. Yes.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

Testimony of Bernard McHugh in His Own Behalf.

BERNARD McHUGH, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. You may state your name? [163]

A. Bernard McHugh.

Q. How old are you? A. Thirty-nine.

Q. Are you a married man? A. Single.

Q. Have you any family?

A. I got a mother, two brothers and one sister. I got no family, though.

(Testimony of Bernard McHugh.)

Q. How long have you resided in Alaska?

A. Seven years.

Q. Where have you lived in Alaska?

A. When I first came to Alaska, I worked fourteen months at the Kennecott mines and I went from there to Fairbanks. I lived there one year. Afterwards, I came down to Cordova. In 1919, in the spring of 1919, I came to Juneau from Cordova. In the summer of 1919 I was working in a logging camp down in Rocky Pass, from the 28th of June to some time around the first of February, first week in February. After the Fourth of July, 1919, I worked two months on the school that was built at Juneau, up at the Sisters' Hospital, for about two months. I went from there to a mine out from Juneau about sixty-five miles, called the Jualin mine. I worked there about two months, and I worked for the Road Commission out of Juneau after that, for a while. In the spring of 1920 I went to Hyder and I worked at Hyder till—I worked about a year, or eleven months. I worked till the middle of July, 1921. I came back to Ketchikan and I went up to Anchorage, and I went to work in the coal mines, government coal mines, above Chickaloon, out at Eska Creek, at the Eska Creek coal [164] mines above Matanuska. I come down from there in December, 1921, and I went to Hyder, stayed there about two weeks, but I didn't work because there was a great snowslide between Hyder and the mine and they couldn't haul provisions up; so they didn't hire men on that account be-

(Testimony of Bernard McHugh.)

cause the road was blocked and they had to get the snow off first, and I come back to Ketchikan, before Christmas, 1921. On the sixth of January, 1921, 1922, I went out to work at the Moonshine mine, a little distance out of here, forty-five, fifty miles. I worked there a month and the compressor got on the bum and so they said they had to lay us off for a matter of two weeks until they got the compressor fixed; so I come back to Ketchikan and I didn't work any more until I went longshoring on the "Latouche" on the eighth day of March, 1922.

Q. And after that what have you done?

A. I went to work on the "Latouche" on March the eighth and at seven o'clock in the evening. I worked five hours until twelve and we went to supper at twelve. Some of the men, some of the crew that shoveled coal before twelve, they quit. They told the longshoreman boss at twelve o'clock—

Mr. ROBERTSON. (Interrupting.) Now, wait a moment—

Mr. WICKERSHAM.—No.

Q. What did you do after one o'clock?

A. I went to work.

Q. Went to work again? A. Went back to work.

Q. Now, then, let me ask you some questions. When did you say [165] you came to Alaska?

A. 1916.

Q. 1916. What job did you first have after you came here? A. Came to Alaska?

Q. Yes. A. At the Kennecott Mine.

(Testimony of Bernard McHugh.)

Q. What occupations have you followed in your lifetime, Mr. McHugh?

A. I'm a plumber by trade.

Q. But in Alaska have you worked at your trade?

A. Yes, sir.

Q. How much of your time?

A. I worked for seven months; about eight months at Hyder. I worked at Hyder at my trade all but the first six weeks I was there. I worked as a laborer, but I asked for a job as plumber when I first went there, but I didn't get it for six weeks.

Q. How long did you work at your first job?

A. I worked from the first of March to the 16th of June, the year after.

Q. You worked from the first of March to the 16th of June the following year? A. Yes, sir.

Q. You mean that you worked more than one year?

A. Well, that is the way I went to work.

Q. I don't quite catch whether you mean you worked from March to June—

A. (Interrupting.) I worked pretty near fifteen months, fourteen months.

Q. Where was this? [166]

A. Kennecott mines.

Q. What were you doing there?

A. I had pretty near every position on the mine. I had a bulkhead job for a few weeks. I got that because I refused to go mucking. I told them I would go down the hill if I didn't get a job besides mucking.

(Testimony of Bernard McHugh.)

Q. Then what did you do?

A. He gave me a job as handy man. I made different things and I timbered a shaft 190 feet, and I put in an air ventilation for the compressor room. I used galvanized pipe for the ventilation. I put some pegs and planks across made independent platforms every sixteen feet and when I gets through with that I puts that ventilation pipe in. It was to ventilate the compressor room that was in the mine about a distance of a quarter of a mile in a tunnel, and this ventilation shaft extended to the surface.

Q. Well, now, is that the general character of the work that you did there? Did you do anything else?

A. I worked on the surface. I never worked in the mine. I refused to work in the mine, because I never saw a mine until I came there. That's the first mine I ever saw.

Q. Have you described to the jury the character of work you did at Kennecott?

A. That is the nature of the work that I did there.

Q. How long did you do that kind of work at Kennecott?

A. About fourteen months and a half.

Q. What compensation did you receive?

A. I made an average of— My checks were from \$125 to \$147 a month clear of my board. [167]

Q. What is that?

A. The pay checks that I received averaged,

(Testimony of Bernard McHugh.)

some of them was a hundred and twenty-five a month, and they were as high as one hundred and forty-seven, and some of them, the first time I went there, the first few weeks, they were below a hundred; they were around ninety-five, and they kept raising me as the copper. They paid a rate of wages there on a scale according to the price of copper. I was paid a certain amount for wages and a bonus scale.

Q. Did that include your board, or was that aside from your board?

A. That was aside from my board.

Q. That was in addition to your board?

A. Yes, sir.

Q. When you had worked there fourteen months, as you have stated, where did you go?

A. I started towards Fairbanks. I decided to go to Fairbanks, so I left Chitina, but I went to work on the government trail before I reached Fairbanks, and I worked the remainder of the summer there.

Q. How much did you receive there?

A. I received five dollars and board. I worked between Munson and Fairbanks, on the Fairbanks end of the road?

Q. What character of work did you do on the road?

A. Mostly axe work. They were building bridges and culverts; repairing bridges and culverts.

Q. How long did you work there?

A. I worked from about the 18th. I left Chitina

(Testimony of Bernard McHugh.)

the sixth of [168] July and I must have got this work about, after the 15th of July. I went to work there and I worked from then on till about the last days of October.

Q. Then what did you do?

A. I went out to Tolavana and I went to work with other fellows that was working on a claim, and I worked with them for the winter months and they washed their dump in the spring when the water first started to run.

Q. Yes.

A. And we divided the pay; so I quit. I pulled away from them and went into Fairbanks and took a rest for a few weeks.

Q. What was your compensation there?

A. I made about, we made about \$1100 each for the winter's work.

Q. For how long a time?

A. Oh, we worked about four months and a half or five months. We were longer than that on the job, but there were days when we didn't work; they were too cold, and we lost a lot of time.

Q. How much do you say you received as your share of that work?

A. I received \$1100.

Q. That was at Tolovana? A. Yes, sir.

Q. Where did you go from there?

A. I went into Fairbanks and took a rest for about three weeks, and I took station work on the Fairbanks end of the road.

Q. What?

(Testimony of Bernard McHugh.)

A. I took station work on the Fairbanks end of the road, the railroad; they were building the road. The steel wasn't laid. [169]

Q. On the railroad? A. Yes.

Q. How long did you work there?

A. I worked for three months. I went to work about the 28th of July and I worked until the thirtieth of October. The frost came and I had to quit.

Q. What character of work did you do?

A. I worked with a pick and shovel and a wheelbarrow and four planks that extended sixteen feet along to run on for this wheelbarrow.

Q. In other words, you were grading? A. Yes.

Q. With a wheelbarrow, pick and shovel.

A. Yes.

Q. How did you break up the rock or the material which you were handling?

A. It was soft mud—frozen mud. It was soft at that time. There was no rocks there whatever. We didn't need a pick even.

Q. What did you make there?

A. I made nine hundred and eighty for a little better than three months.

Q. Where did you next work?

A. The next work I did—I left Fairbanks the last days of November and I walked to Chitina and I came on to Cordova and I did a little longshoring that winter in Cordova because I wasn't—I wouldn't have gone longshoring only that being the winter of 1918, I was quarantined at Cordova

(Testimony of Bernard McHugh.)

and at the time the quarantine come on, you wouldn't [170] be allowed out of town.

Q. Where did you work at longshoring?

A. Down at the dock.

Q. What dock? A. On the Cordova dock.

Q. You mean on the railroad dock?

A. Yes. I worked on a flatcar, throwing sacks of ore—there was two men to a sack—with a hook. Each had a hook with a handle on it and we would hook on to these sacks and throw them on to a sling or wire netting, whatever it was.

Q. How long did you work at that?

A. About two weeks, probably a little more. The weather was bad—snow and rain.

Q. What did you receive for that?

A. They paid at the rate of \$170 a month.

Q. Where did you go from there?

A. (Continuing.) Is what they paid, but I only worked for two weeks and a few days.

Q. Where did you go from there?

A. I came down to Juneau.

Q. What did you do in Juneau?

A. I went out to a logging camp.

Q. Where was that logging camp.

A. At Rocky Pass. That was in the spring of 1919.

Q. How long did you work there?

A. I worked about five months.

Q. What did you do—what class of work?

A. Well, there was only five men in the camp, five or six; I forget how many. There was five

(Testimony of Bernard McHugh.)

men in the camp. They had [171] a logging donkey and at the time they were hauling piling I bucked wood with a cross-cut saw and split it and fired the donkey at the time they used the donkey to haul logs.

Q. How long did you do that work?

A. Well, we didn't haul every day, because—

Q. (Interrupting.) How long were you there?

A. I was there five months.

Q. And about what did you earn there?

A. We got six dollars and board and we got half a shift for overtime. We did a lot of overtime; that is, we would have to go out at high tides and chain up the piling that they hauled out.

Q. You say you got six dollars and board. What do you mean? Six dollars for what time.

A. I got six dollars for eight hours and my board.

Q. And your board. When was that?

A. That was in the spring of 1919.

Q. Then where did you go?

A. I went back to Juneau. I quit this camp, or we were through. I left there the 28th of June and I went to Juneau.

Q. What did you do there?

A. I laid off for about a week till about the seventh or eighth of July when I went to work on the school that was building, that the Sisters built up on the hill there at Juneau.

Q. How long did you work there?

A. Pretty near two months—seven weeks.

(Testimony of Bernard McHugh.)

Q. What did you do?

A. I was carpenter helper.

Q. What did you do in that class of work? [172]

A. I used a hammer and drove nails; used the saw once in a while.

Q. And you worked at that about seven weeks?

A. About seven weeks.

Q. What compensation did you receive for that?

A. I got six dollars a day for eight hours.

Q. Then where did you go?

A. I went out to the Jualin mine.

Q. How long did you stay out there?

A. I stayed out there about nine weeks.

Q. What did you do?

A. I shoveled rock into a car. They was driving a tunnel there.

Q. How long did you work there?

A. About nine weeks.

Q. What compensation did you receive?

A. This was a contract. I don't know how we were paid. Three and a half a day and a bonus. It was a funny kind of a contract.

Q. Three and a half a day, and what about your board?

A. We made—I made \$167 a month and 155 clear of my board and 145, and so on; like that.

Q. How long did you say you worked there?

A. Nine weeks.

Q. Where did you go from there, Barney?

A. I worked out on the road for the Road Com-

(Testimony of Bernard McHugh.)

mission. I worked on the road out of Juneau, out towards the glacier, at the end of that road.

Q. How long did you work there?

A. I worked there about three months. [173]

Q. What character of work did you do?

A. This was in the winter time. They were blasting rock.

Q. What did you do?

A. We were throwing this rock after they blasted. We were spreading it out, throwing it down the cliff. This road was around a bluff.

Q. Did you do that kind of work? A. Yes, sir.

Q. How long? A. About three months.

Q. What compensation did you receive for it?

A. We were paid four dollars and board for eight hours.

Q. You say that was in the winter-time?

A. Yes, sir.

Q. What winter?

A. That was the winter of 1919.

Q. Where did you go from there?

A. I went to Hyder. The next work I did after that was in Hyder.

Q. When did you go to Hyder?

A. Spring of 1920.

Q. What time, can you remember?

A. The last of May, about.

Q. What did you do in Hyder?

A. I asked for a job as a plumber as I went there. The manager told me they didn't have much work at the present time, that they had one plumber

(Testimony of Bernard McHugh.)

working, and he told me if I took a job as mucker, why the first opportunity there will be, I will give you a show with the plumbing job. [174]

Q. Well, what did you do? Did you go to work as a mucker?

A. I went to work at the logging camp. They had teams hauling logs out to a sawmill. They used to haul those logs with a go-devil, and I used to roll the logs on to this go-devil.

Q. How long did you work at that kind of work?

A. About six weeks.

Q. What compensation did you receive for it?

A. I got six dollars a day.

Q. Six dollars a day and what about your board?

A. I paid board out of that; paid a dollar and a quarter for board.

Q. You got six dollars and paid \$1.25 for board?

A. Yes.

Q. How long did you work there?

A. About six weeks.

Q. Then what did you do?

A. I went to work as a plumber.

Q. Where did you work as plumber?

A. I did plumbing in the manager's residence and in the bunkhouse, when there was nothing to do; besides, I did pipe fitting in the mine.

Q. How long did you work at that?

A. About eight months and a half.

Q. What compensation did you receive for it?

A. Seven fifty a day, for eight hours.

Q. What about your board?

(Testimony of Bernard McHugh.)

A. I paid board out of that.

Q. How much?

A. Dollar and a quarter. [175]

Q. So you received seven fifty, minus a dollar and a quarter? A. Yes sir.

Q. For about eight months?

A. For about eight months and a half.

Q. Can you remember when you ceased to work there? A. About the 11th day of May.

Q. What year? A. 1921.

Q. 1921. Where did you go then, Mr. McHugh?

A. I went up to Anchorage when I left Hyder.

Q. About what time did you get up to Anchorage?

A. I stayed around in Ketchikan for a few weeks. When I left Ketchikan, my intention was to go to Mayo and I bought a ticket to Skagway and I got off there, but I changed my mind. I got "cold feet," and I had to wait there for a boat, to get a boat to take me to Anchorage. After I got to Anchorage, I took another rest there. I didn't work. I didn't ask for work of anybody for a few weeks. I could have got work on the road. I am not a railroad man anyway.

Q. What?

A. I could have gone to work on the road. I never worked on a road and I went to work out in the coal mine.

Q. What coal mine? A. Eska coal mine.

Q. How long did you work in the Eska coal mine?

A. I must have gone to work there the first of

(Testimony of Bernard McHugh.)

September and I worked there till about the middle of November. It shut down then. [176]

Q. You worked there about a month, you think?

A. I worked there about two months and a half.

Q. About two months and a half. What compensation did you get for that?

A. I got \$8.75 a day, and a dollar and a half a day board off from that; in fact, they pay the same wages to-day at the Anchorage coal mines.

Q. Where did you go after you left the Eska coal mine? A. I came back to Hyder.

Q. You didn't work at Hyder then?

A. No, sir; I stayed there at Hyder two or three weeks.

Q. There was no work and you came away?

A. No, they weren't hiring anybody at that time.

O. Where did you go to then?

A. Came to Ketchikan.

Q. When was that?

A. That was in 1921, in December.

Q. 1921? A. Yes, sir.

Q. In December, did you say? A. Yes, sir.

Q. When did you begin working on the "Latouche" down here? A. The eighth of March.

Q. The eighth of March, what year? A. 1922.

Q. Had you been in Ketchikan from the time you came here in December until you began to work on the "Latouche"?

A. No, sir; I went out to work at the Moonshine mine the sixth [177] day of January, and I worked there about a month, and it was a one-horse

(Testimony of Bernard McHugh.)

outfit and the compressor gets on the bum, so he needed to repair it and come into town, and he laid us off; said there would be no work for about three weeks. He wanted me to go out again, but I refused to go.

Q. Now, have you given generally all the places you have worked during the period that I have questioned you about?

A. As near as I can remember.

Q. Prior to that, where did you work? Did you ever work in Seattle? A. Yes, sir.

Q. What business were you in there?

A. I was in the plumbing business.

Q. How long?

A. I came to Seattle from San Francisco, in the spring of 1908, and I worked in Seattle till the spring of 1911.

Q. What did you do there?

A. I worked as a plumber.

Q. All the time? A. Yes, sir.

Q. And when you left Seattle, where did you go to? A. Vancouver.

Q. How long were you there? A. Two years.

Q. What did you do there?

A. I worked as a plumber.

Q. All the time?

A. I was in business, in fact, for myself. [178]

Q. All the time? All the time you were there?

A. Yes, sir.

Q. And then where did you go?

A. I went to Victoria.

(Testimony of Bernard McHugh.)

Q. How long were you there?

A. I must have been there about fifteen months.

Q. What did you do there?

A. I worked as a plumber.

Q. Then where did you go?

A. I come back to Seattle.

Q. How long did you remain there?

A. About a year and a half.

Q. Then where did you go?

A. Come back to Alaska.

Q. What did you do while you were in Seattle this last time?

A. After I came from Vancouver?

Q. Yes.

A. I worked as a plumber.

Q. You worked as a plumber? A. Yes.

Q. And you came to Alaska, you say, in what year? A. In the spring of 1916.

Q. How old are you? A. Thirty-nine.

Q. What kind of health have you had during all these years you are talking about?

A. I have never been sick.

Q. Are you or are you not a strong man?

A. Strong physically in every way, only my foot at the present [179] time.

Q. And you are thirty-eight years old or thirty-nine?

A. Thirty-nine. I'll be thirty-nine next October.

Q. Now, tell us about going down on board the "Latouche" to work. What day did you go there?

A. I was hired on the eighth of March, 1922.

(Testimony of Bernard McHugh.)

Q. What time did you go to work?

A. I went to work at seven o'clock in the evening.

Q. Who employed you?

A. The longshore boss.

Q. What was his name, do you know?

A. Well, I don't know his name. I didn't know his name at that time, but I have heard—I don't really know his name yet, any more than what I have been told, that his name is Pauzi or Pozi, or some name like that.

Q. What did he say to you when he employed you about your work?

Mr. ROBERTSON.—Now, if the Court please, that is entirely—

Mr. WICKERSHAM. (Interrupting.) I want to ask him if he gave him any instructions.

A. At the time he hired me to shovel coal, he asked me how I was on the muck stick.

Q. What did you tell him?

A. I told him I used it in other places.

Q. Did you ever work on board a boat before, in that class of work?

A. No, sir; that was the first time I ever worked aboard a ship.

Q. Had you ever worked in the hold of a boat, unloading coal before that night?

A. No, sir. [180]

Q. Had you ever had any experience in handling coal buckets such as is represented by this illustration on the blackboard before you before that night?

A. No, sir.

(Testimony of Bernard McHugh.)

Q. Were you given any instructions that night about how to manage this bucket or the business generally?

A. The only thing that was ever told to me is what the longshore boss asked me at the time he hired me.

Q. If you could handle a muck stick?

A. Yes, sir.

Q. What did he mean by that?

A. He meant that that was the kind of a man he wanted for that job.

Q. What did he mean by muck stick?

A. To shovel coal into those iron buckets.

Q. What time did you go to work?

A. Seven o'clock in the evening.

Q. Where did you work?

A. I worked in the hold on board the boat "La-touche."

Q. How many men were at work at that time?

A. There was eight men in the hold as I went in that night.

Q. And you made the ninth? A. I made nine.

Q. How many buckets were used?

A. Three buckets.

Q. How many men worked at each bucket?

A. There were three men on each bucket.

Q. Who worked at the bucket with you? [181]

A. There was a native boy and a white man.

Q. Have you seen the native boy recently?

A. Before twelve o'clock, the first five hours I was there, there was two white men.

(Testimony of Bernard McHugh.)

Q. Two white men? A. Yes, sir.

Q. And after twelve o'clock or after one o'clock?

A. At twelve o'clock we had supper and some of these men quit. They told the longshore boss, or told somebody at the time they got out on the deck of the boat, that they weren't coming back after supper. They wanted to know when they were going to get paid and they told them they wouldn't get paid until the next day.

Q. Then after one o'clock you came back to work again? A. Yes, I came back to work.

Q. Who worked in your gang of three then?

A. There was a native boy and a white man.

Q. Who was the native boy?

A. At that time I didn't know his name, but I learned his name afterward. His name is Frank Williams.

Q. Is he the man that was on the witness-stand here yesterday? A. Yes, sir.

Q. Now, you went to work at seven o'clock?

A. Yes, sir.

Q. What did you do?

A. I shoveled coal in a bucket something similar to that (indicating), in make to that one.

Q. Did you ever see one of those buckets before?

[182]

A. Yes, I have saw coal buckets before.

Q. Had you ever worked with one? A. No, sir.

Q. Did you ever have any experience in the management of one? A. No, sir.

Q. Who run the bucket in your gang of three?

(Testimony of Bernard McHugh.)

Who had experience, if you know? Who managed the bucket before dinner that night?

A. The fellow that quit seemed—me and the other fellow seemed to leave it up to him. He god hold of the bucket ahead of us and mostly hooked that hook on to it. He would go and take the hook off the other buckets and hook it on at the time we loaded it, and I did that mostly after one o'clock, after he quit.

Q. Did you know the mate on the boat?

A. No, sir.

Q. Who was in charge that night?

A. No, sir.

Q. Would you know him now if you saw him?

A. No, sir.

Q. Did you see the mate down there at any time after seven o'clock and before twelve?

A. There was nobody down in the hold at any time while I worked there, only the men that shoveled coal.

Q. Now did you have any trouble with the bucket that you worked with before twelve o'clock?

A. No, sir.

Q. You worked shoveling coal into the bucket right along after twelve o'clock. [183]

A. Yes, sir.

Q. And do you know whether the bucket was in order or not? Do you know anything about that?

A. I don't know whether it was in order or not. I never examined it.

Q. Why?

(Testimony of Bernard McHugh.)

A. Well, I expected that it was in good condition, in working condition.

Q. Had you ever examined a bucket like it before? A. No, sir.

Q. Had no experience with such a bucket?

A. I never worked with a bucket like that before.
Mr. ROBERTSON.—That certainly is leading.

Q. You quit at twelve o'clock and went to dinner?

A. Yes, sir.

Q. At midnight? A. Yes.

Q. And when did you go back to work again after midnight? A. At one o'clock.

Q. Now, who worked with you after one o'clock on that bucket?

A. There was a native boy and a white boy.

Q. The native boy you say was Frank Williams?

A. Yes, sir.

Q. How long did you work after one o'clock?

A. I worked about twenty minutes.

Q. About what?

A. About twenty minutes, or thereabouts.

Q. When you were paid off, how long were you paid off for? [184] A. I couldn't tell you.

Q. You don't know?

A. I was suffering too much. Money didn't trouble me at the time.

Q. Well, about twenty minutes after one o'clock, you may tell the Court and jury just what happened to you?

A. At about twenty minutes past one, or thereabouts, I don't know exactly what time it was; I

(Testimony of Bernard McHugh.)

don't know how long I was working after one o'clock. The bucket at this time was lowered by the winchman to the floor of the first hatch and the coal was shoveled—there was no coal around there except what was in underneath the sides. There was some in front of the winchman, extending down on a slope and that side on the floor around where the open space is was all shoveled up and we were shoveling from underneath the wings, or whatever you might tell them—

Q. (Interrupting). Wings is good enough.

A. The bucket was lowered down by the winchman at that time and landed in position somewhere on the floor or the deck and this man that gave evidence for me yesterday, Soderberg, he comes over to Mr. bucket and hooks this hook off, takes that side (indicating) or grabs hold of it at the back on the center of the rim. I got hold of it with my left-hand and the native boy was on one side and the white man on the other and I was pulling on the back and as soon as we started to get it going, we gave a pull—we were coming about two or three feet, I should judge, when it fell to pieces and the bail struck me on the arch of my left foot.

Q. Where were you standing when the bail fell? [185] A. I was standing at the back.

Q. What were you doing?

A. I was pulling on the bucket.

Q. Where had you stood before and pulled on that bucket? A. Mostly at the back.

Q. Well, at any other place?

(Testimony of Bernard McHugh.)

A. At other times, before twelve o'clock, sometimes if I would be the first one that would get to the bucket, I would grab hold of it, usually on the side that was next to me, whether it was the front or the back.

Q. What was your custom about pulling it or pushing it by the back or the front? How did you do that?

A. Well, we just grabbed hold of it the easiest way that we could get hold of it and just pulled it or pushed it during the time that I worked there.

Q. What was under that bucket to enable it to go easily? A. There were three rollers.

Q. Something like that? A. Yes.

Q. Which way could you push or pull the bucket?

A. You could either push it or pull it either way, or you could turn it any time after you wanted to move it on the floor. It would swing or go in any direction if you pushed it in that direction.

Q. What was your custom about pushing it or pulling it by the snout? Which part went in first towards the coal?

A. As a rule, it stood mostly on the side for to shovel the coal in. At the time we were shoveling coal underneath the wings, and if the front of the bucket would be facing the coal, there wouldn't be room for all three of us. We [186] would have to have a little cargo space in which to stand for to, in order to shovel the coal into the bucket.

Q. And who managed this hook on the tub?

A. Most any of us.

(Testimony of Bernard McHugh.)

Q. Most any of you.

A. At any one time. Nobody in particular.

Q. Now you worked after twelve o'clock with Frank Williams and this other man. Who was the other man?

A. I didn't know his name, but at the time that I was in the hospital, there was a fellow came to see me—

Q. (Interrupting.) Well, if you didn't know his name, you need not tell what somebody told you.

A. I don't know the man's name.

Q. Have you seen him since? A. No, sir.

Q. Do you know where he is?

A. I heard that he went and bought a ticket to Cordova.

Q. How soon after you were injured?

A. During the time I was in the hospital. I heard this. I don't know if the man went there or not, but this is what I was told.

Q. You don't know the man's name?

A. No, sir.

Q. Or where he is? A. No, sir.

Q. Now when this handle fell, what did it do to you?

A. It struck me on the arch of my foot and broke two bones and injured another one. [187]

Q. What part of the handle struck your foot?

A. That there part that sticks up where the hook goes on, where you hook the hook on.

Q. Above the handle here (pointing)?

A. Yes.

(Testimony of Bernard McHugh.) *

Q. What was it above that handle that struck your foot?

A. Well, it was just the piece, sticks out there (indicating), of steel there, with a hole to hook the hook on.

Q. What was that?

A. Oh, it was about two inches square, with the hole in it it would make that, maybe, an inch and a quarter. It was in a round shape on the top.

Q. What was that round piece used for?

A. To have this hole here (indicating) for the hook to hook on.

Q. To hook the hook on. What do they hook the hook on there for.

A. For the winchman to hoist it up.

Q. It was hoisted by that round hole?

A. Yes, sir.

Q. What part of that apparatus was it that struck your foot?

A. That apparatus that extends above that line (indicating); that hit my foot.

(Whereupon a short recess was taken.)

(Court met pursuant to recess.)

Testimony of Val. Klemm, for Plaintiff (Recalled).

VAL KLEMM, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.) [188]

Q. Mr. Klemm, you say you went to work there at one o'clock? A. Yes, sir.

(Testimony of Val. Klemm.)

Q. I wish you would tell the jury again about when it was that the first bucket dumped?

A. Why—

Q. How soon after you went to work.

A. That was either the first or second bucket that came out.

Q. Yes.

A. And it dumped about five or six feet outside of the hopper just abreast of me, about on the same level, and if it swung out a little more to the side and dumped, it would probably have knocked me off the platform—

The COURT.—(Interrupting.) Never mind that. The last part of the answer may be stricken. He didn't ask you what it might have done.

Q. I will ask you this question: did you have any conversation at that time with the mate about that bucket? A. Yes, sir.

Q. Now just tell the court and jury what conversation you had with him about that at the time this bucket dumped.

A. Well, he said something about that bucket dumping down there and I told him that the bucket dumped before it ever came up to me. I didn't dump it; I had nothing to do with dumping it.

Q. What else did you say?

A. And I told him—The winch-driver would swing his bucket over to me so it would go down the hold the right way, you know—right side up, and when I hooked it up, I saw that the catch was broken. There was something wrong with it.

(Testimony of Val. Klemm.)

[189] The catch was broken; and I told him that the bucket is liable to dump any time; it's dangerous. I said, "Somebody is liable to get hurt with that bucket." I told him, "You oughtn't to use that bucket."

Q. What if anything, did he say?

A. He said he only had three buckets; probably have to knock off one gang. He didn't say that to me, but he said that was all the buckets he had, was the three of them.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Who did you tell that to?

A. Why, I spoke to the mate.

Q. Who was the mate?

A. Well, I couldn't tell you. It was dark down there. I couldn't recognize the mate from where I was.

Q. How far were you away from him where you were?

A. I was probably thirty or forty feet; thirty or thirty-five feet.

Q. And you called to him?

A. He spoke to me and I spoke to him.

Q. And that was when the bucket, the first bucket dumped after you came on shift?

A. Probably the first or second bucket. I wouldn't say. It dumped in midair.

Q. The bucket was used after that?

A. Why, yes; it was used, all right.

(Testimony of Val. Klemm.)

Q. Used all right.

A. Yes, sir; that is, it was used up to the time the boat left. [190] The boat left around one o'clock, somewhere around one o'clock in the day.

Q. You stayed on shift until the next day when the cargo of coal was fully discharged and this bucket was used all the time?

A. I stayed there until all the coal was discharged that was to go off here. She still had more coal on.

Q. But I mean the cargo of coal for Ketchikan.

Mr. ROBERTSON.—That's all.

**Testimony of Bernard McHugh, in His Own Behalf
(Recalled).**

BERNARD McHUGH, the plaintiff herein, recalled in his own behalf, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. McHugh, I wish you would tell the jury about how much money you have received for your labor that you have recounted to the jury, per annum, per year, since you have been in Alaska?

A. About \$1800 or \$2000 a year.

Q. Prior to the time you were hurt?

A. Yes, sir.

Q. Now since that time what have you received?

A. Since the time I got hurt?

Q. Yes.

A. I received nothing; I received charity.

Q. From whom? A. I received charity—

(Testimony of Bernard McHugh.)

Mr. ROBERTSON.—(Interrupting.) I object to that as incompetent, irrelevant and immaterial.

A. I received charity— [191]

The COURT.—Wait a minute now. Objection sustained.

Mr. WICKERSHAM.—We want to make an offer, may it please the Court, to show the facts about that.

The COURT.—From whom he received charity?

Mr. WICKERSHAM.—Yes, and how much and why he received it.

The COURT.—I don't think it is material from whom he received it. You can ask him why he received it or about his capacity for labor or anything of that kind, but not the people from whom he received it. I think that is immaterial and irrelevant.

Mr. WICKERSHAM.—But we have witnesses here and we wanted to connect them up with it; that was all.

The COURT.—I don't think it is material.

Mr. WICKERSHAM.—From whom?

The COURT.—Yes.

Q. How have you lived since the time of your injury; since the time you left the hospital?

Mr. ROBERTSON.—We make the same objection to that, if the Court please.

Mr. WICKERSHAM.—What I mean, may it please the Court, is how he has obtained money to live on.

(Testimony of Bernard McHugh.)

Mr. ROBERTSON.—If the Court will pardon me, what difference does it make? Assuming the man was rich instead of poor, as I assume he is, that wouldn't make any difference in the question at issue in this case, as to whether or not the defendant should pay him damages.

The COURT.—Yes, the only question is as to his capacity for labor.

Mr. ROBERTSON.—Yes.

The COURT.—You can question him as to his capacity for labor [192] by reason of the accident. That's all. I don't see the relevancy of the question as to how he lived. He has already stated he lived on charity.

Mr. WICKERSHAM.—Well, we offer to show how he obtained that charity, from whom, to what extent and why he had to take it.

The COURT.—Well, you can show a part of that, but I don't think it is relevant from whom he received it. You can show why his living was contributed to, but not the people. I don't think it is relevant.

Q. Will you state to the jury, then, Mr. McHugh, why you have had to receive contributions or charity from other people?

Mr. ROBERTSON.—We make the same objection.

Q. Since the eighth or ninth day of March, 1922.

Mr. ROBERTSON.—We make the same objection to that, if the Court please.

Mr. WICKERSHAM.—Well, we offer to show—

(Testimony of Bernard McHugh.)

The COURT. (Interrupting.) He man answer.
' Mr. ROBERTSON.—Exception, if the Court please.

Q. Go ahead and state why you have had to receive money in that way.

A. I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital, I had only \$28 of my own and the money I received afterwards, of course, I had to borrow it; that I must have in order to live.

Q. Now, Mr. McHugh, let's go back to the time you say this handle, this bail fell on your foot in the hold of the [193] steamer "Latouche." Do you know what caused it to fall?

A. It must have been broken—

Mr. ROBERTSON.—Now, I ask that that question be answered yes or no.

Mr. WICKERSHAM.—I asked him if he knew what caused it to fall.

Q. Did you unloosen it or do anything to loosen it?

The COURT.—Do you know? Answer that yes or no. A. No.

Q. Did anybody else unloosen it? A. No, sir.

Q. Was there anybody around it when it fell—touching it?

(Testimony of Bernard McHugh.)

A. There was nobody touched the bail under any consideration at that time.

Q. Just come over here and show the jury where you were touching the bucket and where the other two men were touching the bucket.

A. I had hold of it right here (indicating).

Q. In the center of the back of the bucket?

A. In the center of the back of the bucket, on the rim.

Q. What were you doing?

A. I was pulling it towards the coal pile, and there was a man on this side and there was a man on that side.

Q. What were they doing?

A. They were pushing—

Q. (Interrupting.) Pushing.

A. Or pulling, I don't know which.

Q. Do you know which part of this bucket was going forward? [194]

A. This here part was going forward.

Q. You were pulling on it? A. Yes, sir.

Q. Now, what was there on that bucket to pull it with?

A. There was not a thing on it, only just a bail, just the bucket. There was no ropes on it or anything.

Q. You're sure about that?

A. There was nothing; only grab hold of the rim of the bucket.

Q. Were there any ropes around it anywhere to pull it by? A. None whatever.

(Testimony of Bernard McHugh.)

Q. Do you know whether there were any handles on it to pull it by? A. Never saw one.

Q. And you don't know anything about this mechanism of this so-called tripper?

A. I don't know anything about that.

Q. Had you ever seen one before? A. No, sir.

Q. Well, do you know where the bucket, the handle of the bucket fell? Do you know what caused it to fall?

A. It must have been broken—

The COURT.—Wait a moment.

Mr. WICKERSHAM.—No; no.

The COURT.—Strike that answer.

Q. I asked you if you knew.

The COURT.—The question is whether you know. Answer that yes or no.

A. I don't know what caused it to fall.

Q. Did it fall? [195]

A. It certainly fell to pieces right quick.

Q. Now, you may state to the jury where it struck you?

A. It struck me on the arch of my left foot and it broke two bones and injured the outside bones of the—

Q. (Interrupting.) What happened then after it fell and struck your foot?

A. Why, some of the men that shovel coal helped me to get up towards the deck, but they never got on dock. The coal extended in front of the winchman down to the floor on a slant and they worked me, helped me out of that and I gets up on

(Testimony of Bernard McHugh.)

deck and I looked around and I didn't seen anybody on the deck, and I started to go on the gangplank to go on the dock and I saw a man on the dock. He was the first man I saw, and he asked me if I was hurt, and I says, "Yes," and he says, "Why don't you report to the mate?"

Q. Do you know who that was?

A. No, sir; I don't.

Q. What did you do?

A. I told him I didn't know who the mate was and he pointed his hand to a window on the door on the boat and he said, "You go to the door where the light is," and I limps over there and knocks on this door and somebody from the inside said, "What's the matter?" and I says, "I got hurt," and he said, "Well, just because you got hurt you don't need to wake up everybody on the ship."

Q. Well, in the meantime had you seen the mate or anybody in charge?

A. The only one I saw was this man on the dock.

Q. You know who that man was? [196]

A. No, sir.

Q. Don't know whether it was the mate or not?

A. No, sir.

Q. I meant, had anybody been down in the hold at that time except the men at work?

A. There was nobody in the hold except the men that were shoveling coal from the time I went to work.

Q. Did you see the mate down there?

A. No, sir.

(Testimony of Bernard McHugh.)

Q. Did you meet him anywhere from the time you went up to this door? A. No, sir.

Q. Tell us what happened.

A. I woke him up and, of course, he told me he got nothing to do with it. He told me not to wake everybody up on board the ship, and I hops away from there. I stays there for a few minutes squealing and yelling with pain, and I got hold of a lifeboat and I hung on to that for three or four minutes, and I saw somebody coming aboard from the dock, and I hollered out to him and he comes over toward me and he went around to wake somebody else up over on the opposite side of the cabin on the boat and he takes me over to this room, takes me in, wakes the man up. He was a one-armed guy.

Q. The man in the room was a one-armed guy?

A. Yes. There was a safe in it, safe in the room and that man gets a bucket of hot water and I got my foot into this bucket of hot water.

Q. Who was the man that took you to that door?

A. I don't know who he is. [197]

Q. Do you know whether he was the mate or not?

A. No, sir; I don't know.

Q. Well, go ahead then.

A. So they called up the doctor, after I got my foot into this water, in the middle of the night, and they says they got no answer from the doctor when they come back, so they called up a taxi and took me aboard this taxi—

(Testimony of Bernard McHugh.)

Q. (Interrupting.) Who took you aboard the taxi?

A. Why the taxi man come in there and this man that led me to this—

Q. (Interrupting.) How did you get out of this office where you were on this boat?

A. The taxi man helped me out and also the man—I think it was the same man that led me to this room.

Q. You don't know who he was?

A. I don't know the man's name.

Q. Well, go ahead.

A. And they takes me off and put me aboard this taxi and lands me in the hospital.

Q. What time of the night was that?

A. Oh; it must have been around two o'clock; I suppose.

Q. What hospital did you go to?

A. There was only one hospital here that time. The Arthur Yates Hospital.

Q. The Arthur Yates Hospital here on Mission Street? A. Yes, sir.

Q. Was a physician called?

A. Not that night; no. There was no doctor came there until eleven o'clock the next morning.

[198]

Q. What did you do in the meantime?

A. Why, they packed my feet and give me a couple of shots in the arm.

Q. What doctor came to see you the next day?

A. Doctor Story.

(Testimony of Bernard McHugh.)

Q. What did he do for you?

A. He didn't do anything. He just told me to soak my foot two or three times in hot water, as hot as I could stand it.

Q. How long did you continue that treatment?

A. I continued that for nine or ten days.

Q. Then what happened?

A. Then he puts a plaster paris cast on my foot.

Q. Who put the plaster of paris cast on?

A. Doctor Story.

Q. Did you have any other physician during this time except Doctor Story?

A. They took me over to Doctor Ellis' office and he took an X-ray picture, some X-ray pictures of it.

Q. When? A. Before they put the cast on.

Q. Before they put the cast on.

A. I think they took me over twice; yet I am not positive; they took me over once anyway.

Q. They took you over once anyway and he took an X-ray picture of your foot? A. Yes, sir.

Q. Did Doctor Ellis ever give you any treatment of any kind?

A. No, sir; only took those pictures.

Q. Where did you then go, after these X-ray pictures were taken? [199]

A. They took me in a taxi right over to the hospital.

Q. How long did you remain in the hospital?

A. This plaster paris cast was on about three

(Testimony of Bernard McHugh.)

weeks, twenty days. I was in the hospital, all told, 47 days.

Q. Forty-seven days in the hospital.

A. Yes; I was tired there, too.

Q. When did you get out of the hospital, do you remember?

A. I left there the 24th of April.

Q. Where did you go then?

A. I stayed in a rooming-house for about eight or nine days.

Q. What rooming-house?

A. That Jap rooming-house down the other side of the totem pole down there (indicating); shop down below on the ground floor and there's rooms upstairs, and I roomed there.

Q. Now, just tell the jury what has been the condition of your foot from that time to this.

A. Well, the bones that were broken, Doctor Story set and took the cast off, and he told me it would be some time, it would be a matter of time and they will get strong. He never told me there was anything else the matter with my foot.

Q. Well, did your foot get well? Did it cease to pain you?

A. These bones they knitted for quite a while and they hurted and it also hurt as I tried to walk for a long time afterward, and this here (indicating), this first bone, it hurt about here at the arch always during the time I was in the hospital and afterwards, and every time it's hurted considerably

(Testimony of Bernard McHugh.)

more than ever it should be. I think it was broken and I have aches and pains right now.

Mr. WICKERSHAM.—Now, may it please the Court, I am going to [200] examine this witness as much as I can before the doctor gets here, but when he comes I want him to take his shoes off and have him examined, exhibit his foot and I want the doctor present.

Mr. ZEIGLER.—We have no objection.

Q. How long did your foot hurt you since then and to what extent? Just go ahead and tell the jury. How have you got along with that foot since then?

A. It has hurted ever since I got hurt. There has been pain in this foot. If I use it now to any extent, for the last couple of months after or as soon as I get out of bed in the morning, I walk around pretty good, but before I'm on my foot two hours, it starts to ache and pain and it starts to swell up and then when I go along and sit down at night after whatever walking around I do during the daytime—I take my shoe off as a rule. I take my shoe off when I get home, to the cabin, and there is not much swelling there and then I sit there a couple of hours before I go to bed at ten o'clock or half past ten or eleven, whatever time it might be, and it swells after a time; it swells after the exercise that I have done to it during the day and it aches and pains all right along; but this bone here (indicating) and the bones that have been broken at the present time don't hurt any more.

(Testimony of Bernard McHugh.)

They hurt for about four months after I left the hospital and also they were weak at that time. This here bone (indicating) that was injured, there is a growth there and it is growing towards the bone that is next to it on the inside, and it is growing larger all the time and it hurts and pains all the time, and if I get off [201] these main sidewalks or level plank walks or streets—in Ketchikan they are mostly planked all over—and if I get on to where there is rough ground or walk on uneven ground, I'm crippled altogether. I can't make any headway at all. It hurts more when I am on rough ground than when I am on a level walk, because I walk, because I have a level support on my foot on these planks where I haven't when I am on rough ground.

Q. Now, you speak about a growth on your foot. Just describe it to the jury?

A. Well, it has been growing right along. It is growing worse all the time.

Q. Where is it located on the foot?

A. Right on the arch of the foot there.

Q. And on or near any particular bone?

A. It grows on the inside, towards this next bone. Grows in that direction. It also grows up on top—spreads around—large growth.

Q. What condition is that in now? Has it ceased? A. It is still growing larger all the time.

Q. Has it ceased to be painful?

A. It is painful every night and it gets painful

(Testimony of Bernard McHugh.)

whenever I am on my feet two hours in any one day.

Q. Can you work?

A. I cannot. If I could get a job sitting at a desk like that (pointing) I can probably work.

Q. You say you can walk on a level sidewalk for a time?

A. For about two hours in any one day. I have never walked [202] so very far, any more than to come down from the cabin where I live down around the Stedman Hotel and sit down, as I have had to put in most of my time in the winter, and get back and cook and eat and come back there again. I might go down as far as Mrs. Sparhawk's grocery store in Newtown. I have gone down there several times after supper.

Q. What change has this made in your method of work and your occupation as you were able to do before?

A. All I can say about that right now, I'm a cripple at the present time and unable to do any work of any kind such as I have done for the last seventeen years. I can't do it to-day.

Q. Could you mine with your foot in that condition now?

A. No, sir: it would be in everybody's way in the mine.

Q. Could you work in the plumber's trade?

A. No, sir; for I couldn't climb scaffolds or ladders.

(Testimony of Bernard McHugh.)

Q. Now, I ask you, Mr. McHugh, how much of an injury this foot and the accident has been to you? To what extent has it injured you financially?

Mr. ROBERTSON.—Oh, well; now, I object to that.

The COURT.—Yes: objection sustained.

Mr. WICKERSHAM.—We want to show by this witness—

The COURT. (Interrupting.) You can show it, but I don't think your question is in the proper form to show what expense he has been to.

Mr. WICKERSHAM.—Well, I'll renew my offer after we return at two o'clock.

Q. Have you done labor of any kind since you have been injured? [203] A. No, sir.

Q. Is there any work sitting at a desk that you mentioned a while ago that you can do?

A. Well, no; not that I know of.

Q. Have you ever had any education that would fit you for any inside employment?

A. No, sir; I never had anything more than a common school education.

Q. What sort of work have you done all of your life?

A. The first work—

Q. (Interrupting.) Well, in general, similar to what you have already testified to?

A. Well, I have told the nature of the work I have done mostly since I first started to work at the time I was sixteen years old, when I left home.

(Testimony of Bernard McHugh.)

Q. You have never worked in a store or anything like that?

A. No, sir; I never have. I started to learn the plumbing trade when I was sixteen years old.

Q. Have you any other means of making a living except what you have heretofore explained to the jury?

A. No, sir; I have not. I have told the ways—the only way I made a living in the past and that is the only way I know of how to make a living in the future.

Q. Were you paid for what time you were employed on the “Latouche” that night?

A. Yes, sir.

Q. How much were you paid?

A. I don't know how much it was. It was all silver, anyway, [204] from this man with one arm. I don't know his name.

Q. In this room? A. Yes, sir.

Q. And you don't know how much you received?

A. No, sir; I never looked at it. I was suffering too much.

Recess until 2 o'clock P. M. this day, March 27, 1923.

2 o'clock P. M., March 27, 1923.

Court Met Pursuant to Recess.

Testimony of J. H. Mustard, for Plaintiff.

J. H. MUSTARD, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows.

(Testimony of J. H. Mustard.)

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Doctor, you may give the reporter your name?

A. J. H. Mustard.

Q. How old are you, doctor? A. Fifty-three.

Q. What is your occupation or business?

A. Physician.

Q. How long have you been a practicing physician in the Territory of Alaska? A. Since 1905.

Q. Of what school of medicine are you a graduate?

A. Rush Medical School, Chicago, Illinois.

Q. How long have you been practicing medicine since? A. Since 1901.

Q. How many of those years in Alaska, doctor?

A. Since 1905.

Q. Do you know Barney McHugh? [205]

A. Yes, sir.

Q. Have you ever had occasion to treat him for any complaint?

A. He has summoned me from time to time the last ten months or so.

Q. About what?

A. In regard to one of his feet.

Q. When did you have occasion to examine his feet the first time, Doctor?

A. Some time about the middle of May, 1922.

Q. Just state to the jury what you found to be the matter with his feet or foot at that time?

A. Yes. He had sustained some injury to the left foot, and, as a result, two of the metatarsal bones were broken—the second and third—I didn't

(Testimony of J. H. Mustard.)

see them when the fracture was recent, but some weeks afterward; but I did see the X-ray plates that Doctor Ellis had taken and the one that he showed me was apparently of this foot.

Q. And from your examination of those plates, what did you discover?

A. That the second and third metatarsal bones were broken.

Q. Just point out to the jury and describe, in common language, what those bones are?

A. This is the injured foot (handing foot of plaintiff). Leading back from the toes at the margin of these toes, there is a long bone similar to the long bone in the hand which goes to unite with a number of other smaller bones forming the flexible joint of the foot near the heel, similar to the wrist in the arm. Now, each of these bones—the extension [206] back from the toes, is called the metatarsal bone. The metatarsal of the big toe is the first one, the one of the second one is the second, and so on. The second and third metatarsal bones are the ones that were broken. They were broken—you will probably later see the plates—near the middle of the bones.

Q. Were you informed about when they were broken?

A. As I recall it, it was about six weeks, or such a matter before I saw Mr. McHugh the first time, in the middle of May, and it was some time in March, was it not—?

Mr. McHUGH.—Yes.

(Testimony of J. H. Mustard.)

Q. When he first came to you?

A. About the middle of May.

Q. How frequently has he been to you in respect to this matter since?

A. Oh, probably an average of every two weeks since then.

Q. When did you examine his foot last?

A. Last night.

Q. Last night. What have you had to do, if anything, with giving him medical attention since May?

A. Practically continuously since then.

Q. Yes. Now, I will ask you, Doctor, if there was any other bone broken than the second and third metatarsal bones?

A. No other, according to the plates I saw; no other bone was broken, but the patient still—

Mr. WOLVERTON.—Well, now, just answer the question.

Q. Go ahead and state the facts if he has pointed out to you, complained about anything.

A. The patient has all the time complained not so much of the [207] two broken bones, but of the first metatarsal, which the plate did not show was broken.

Q. Now, if there is any change in that first metatarsal bone since that time, point it out and tell the jury, what it is.

A. When I first saw him, there was a good deal of inflammation of the lining of the membrane of the first metatarsal—the perosteum—an inflammation that is known as periostitis. This was quite

(Testimony of J. H. Mustard.)

severe and acute and has remained acute and severe for a good many months since that time. More recently it has become subacute and now the condition is what would be described as chronic.

You will notice— I don't know— Can you turn around? I don't know how well you can see his feet, but if you can see them, you can see that there is a definite—

A JUROR.—No.

The WITNESS.—Then the light is no good (raises shade). I think you can see that on the injured foot there is a very definite enlargement at about the junction of the upper and middle thread of the first metatarsal, and that you don't find on an injured foot. Do you see it?

JURORS.—Yes.

The WITNESS.—And on measurement this foot measures half an inch larger at the same point than the right one does. The inflammation that persisted in the periosteum during all those months has resulted in a deposit of bone underneath the periosteum, due to the acute and subacute periostitis that has existed at that place.

Q. Just show the jury where that bone has been deposited.

A. At about the junction of the upper and middle thread of the [208] first metatarsal, a place where you can— It is quite visible, I think.

Q. Is there a deposit of bone on the outside of the other bone?

(Testimony of J. H. Mustard.)

A. The outside of the other bone, but beneath the lining of the membrane of the bone.

Q. What does it resemble—a swelling or—

A. It is newly formed bone.

Q. Newly formed bone?

A. Newly formed bone.

Q. What has been the effect of that deposit upon his health and his condition?

A. Well, it was an inflammation of the periosteum.

Q. That had an effect upon his health and general condition?

A. The deposit came along with the inflammation.

Q. What caused that deposit?

A. The inflammation of the periosteum.

Q. What caused the inflammation?

A. I didn't see the periosteum until— I didn't see Mr. McHugh until after the injury. It was apparently due to the injury.

Q. Apparently due to the same injury that affected the other two bones?

Mr. ROBERTSON.—We object to that as leading.

The COURT.—Objection overruled. He has stated it was due apparently to the injury.

Q. When will he recover from this growth of bone? Will it ever disappear? A. No, sir.

Q. It will remain with him as long as he lives?
[209] A. Yes, sir.

Mr. ROBERTSON.—All very leading questions to a physician.

(Testimony of J. H. Mustard.)

The COURT.—Yes.

Mr. WICKERSHAM.—Well, he is a physician.

The COURT.—Yes. The first question is all proper—when would he recover from it.

Q. Doctor, how often have you seen and examined him since May last?

A. Probably on an average of every two weeks.

Q. Has he been able to work in that time, Doctor?

A. I believe not.

Q. Why?

A. On account of the condition of his foot.

Q. When will he ever be able to work with that foot at such work as he formerly did?

Mr. ROBERTSON.—Well, now, I object to that unless the doctor knows what work this man did.

Q. When will he be able to resume the occupation of mining—working in coal mines, working in the woods and doing heavy, rough work of that kind?

A. That is a difficult thing to answer, Judge Wickersham.

Q. When did you notice that bony growth first coming there, Doctor?

A. When he first came to me there was a pronounced periostitis of the first metatarsal and some swelling there, but at that time I didn't notice any bony deposit.

Q. Point out and tell the jury, as nearly as you can, where that bony deposit is located with respect to the two bones—the first and second metatarsal bones—how nearly it approaches, if at all, to the second metatarsal bone. [210]

(Testimony of J. H. Mustard.)

A. Well, the bones themselves approach fairly closely at the point of the deposit.

Q. May this situation, Doctor, reasonably prevent him from assuming his work for a long time, or may it not?

Mr. ROBERTSON.—Very leading, if the Court please, and no proper foundation laid, and too indefinite.

Mr. ZEIGLER.—Ask him if he can determine the probable duration of the present condition.

The COURT.—Yes; objection sustained.

Q. Can you determine, from an examination of his foot, Doctor, and his present condition when, if ever, it will assume its normal condition so as to permit him to work at his former occupation?

A. As I said before, that is a difficult question to answer. I couldn't set a day. It might be longer and it might be shorter.

Q. What would that depend upon?

A. It will depend upon the disappearance, entirely, of whatever inflammatory process there was there and upon how much inconvenience the bony deposit is going to cause to him later on.

Q. State to the jury how much, if any, stiffness there is in the foot at that place.

A. It is probably less stiff, or more stiff by twenty-five per cent than the other foot.

Q. Can you state to this jury if that will ever be less stiff than it is now?

A. Yes; I think it will be.

(Testimony of J. H. Mustard.)

Q. Can you state to the jury whether or not that bony deposit [211] will ever disappear?

A. It will never disappear.

Q. Well, can you say, then, whether or not the stiffness will not remain?

Mr. ROBERTSON.—Well, now, I object to that, if the Court please.

The COURT.—Simply getting at it around the other way. I think he may answer.

A. There are all sorts of possibilities, but I wouldn't say that it might not disappear, that it might not remain, but I should expect it to disappear.

Q. The bony process? A. No; I mean—

Q. (Interposing.) The stiffness?

A. The stiffness.

Q. And what would cause its disappearance, Doctor, or progress of recovery, to cause its disappearance?

A. In the daily exercise that the foot goes through which will eventually overcome that stiffness.

Q. In time? A. Yes.

Q. What time?

A. That is difficult to answer.

Q. You can't tell that A. No.

Q. Doctor, in your judgment as a physician, has this man really been suffering from this injury to his foot or has he been malingering— [212]

Mr. ROBERTSON.—(Interrupting.) Now, if the Court please, I think that is calling for an answer to a question that it is not within the province

(Testimony of J. H. Mustard.)

of a physician to answer, as to whether or not a man is malingering. It seems to me that that is a question that the jury must answer. Whether or not a man is suffering from an injury is one thing, but whether or not he is malingering, in other words, attempting to deceive is another thing, and a physician can't answer that. That is a question of fact.

The COURT.—He may answer whether in his judgment he has been suffering from the injury to his foot.

Q. Well, I'll put it in that shape—whether, in your judgment as a physician, having examined him frequently, he has been actually suffering from this injury. A. I believe he has.

Mr. WICKERSHAM.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Doctor, do you recall the first occasion that you examined Mr. McHugh? A. Yes, sir.

Q. Do you have the date?

A. It was about the 15th day of May.

Q. Did you mark it down? A. I did not.

Q. You entered it in your diary? A. Yes.

Q. You have refreshed your memory since on that? [213] A. Yes.

Q. Did you refresh your memory just before you came into the courtroom? A. No.

Q. When was the last time you had occasion to refresh your memory as to the date?

(Testimony of J. H. Mustard.)

A. Oh, I did it last night when Mr. McHugh called my attention to the approximate date.

Q. Was that the first time you ever had occasion to administer, in any way, as a physician, to Mr. McHugh?

A. I think that some months before he had consulted me over some trifling affair. I don't recall what.

Q. Not when he got any injury? A. No, sir.

Q. To his person in any wise? A. No, sir.

Q. Now, Doctor, an injury such as you have now described—a growth on this bone, as I understand it, might that not arise from a number of different ways? A. It might.

Q. Do I understand you to say that the foot is twenty-five per cent stiff? A. Approximately.

Q. Would you say that possibly it was not thirty per cent stiff?

A. I should say the figure is an approximation.

Q. When you say approximately twenty-five per cent would you lower it as low as twenty per cent?

[214]

A. I would.

Q. It might possibly be twenty per cent.

A. It might be.

Q. And exercise would remedy that condition?

A. We would expect it to.

Q. Exercise of the foot. A. Yes, sir.

Q. In other words, Doctor, what do you mean by "exercise"?

(Testimony of J. H. Mustard.)

A. The daily exercise that the foot goes through in going around as we go around every day.

Q. Ordinary use of the foot?

A. I don't mean any specially devised exercise.

Q. You mean, the ordinary use of the foot would tend, in this case, to better it? A. Yes.

Q. In other words—while I am not speaking in medical terms—the foot, if a man sits still and doesn't use the foot at all, it might be that the stiffness would increase in percentage instead of decrease? A. It would.

Q. And it would be more likely to increase if he didn't use it than it would if he made use of it, is that not correct? A. Correct.

Q. Now, would you say that the foot incapacitated him from working as a plumber?

A. If there is any heavy work in plumbing, I should say it would. It wouldn't incapacitate him from collecting.

Q. You mean collecting as plumber? [215]

A. Yes.

Q. Would it incapacitate him from operating a plumbing business?

A. I don't know enough about the work. As I said before, if it is hard physical work, taking a great deal of strain on the feet, it would.

Q. You didn't raise that objection when you were asked about mining?

A. I know enough about mining to know that you couldn't do mining. I have lived a good many

(Testimony of J. H. Mustard.)

years in a mining country and I have never lived with a plumbing outfit.

Q. However, you have more or less occasion to know what plumbers do, don't you?

A. No, I haven't. They have never done anything to me.

Q. Now, do I understand you to say that since May fifth— Was that the date?

A. About the 15th.

Q. About the 15th of May. That since that time you have had occasion to examine Barney's foot once every two weeks? That is, approximately.

A. I didn't say so. I said it would be an average of about once every two weeks.

Q. An average of once about every two weeks?

A. Yes, sir.

Q. During that time the foot has gradually grown worse, has it not?

A. I said quite the reverse, if I said anything.

Q. It has been growing better?

A. Been growing better. [216]

Q. During that time to what extent has it grown better?

A. Considerably better than it was the first time I saw him. At that time he was hardly able to hop along.

Q. Could you fix it by percentage or approximation?

A. I hadn't thought of it along the line of percentages, but it is certainly a good fifty per cent better than it was then.

(Testimony of J. H. Mustard.)

Q. At least fifty per cent better than it was when you first examined it on or about May 15th?

A. Yes, sir.

Q. Is a deposit of bone, or growth of bone, as you have described in a case of this kind unusual or a usual occurrence?

A. I don't understand what you mean by a "case of this kind."

Q. In a case where you have seen the foot, I mean, is such a growth or deposit of bone as you have described, that Barney now has, this bone on his foot, is that unusual or usual?

A. Where an inflammation of the periosteum persists, answering your question—I am not certain what you are asking—but answering a part of your question, wherever an inflammation of the periosteum persists for any length of time, there will be a deposit of bone underneath the periosteum.

Q. There will be.

A. Now, answering what may or may not have been your question, I will say that it is, fortunately, not the rule, in an accident of this kind, for an unbroken bone to be injured in such a way as to set up this periostitis and deposit that bone.

Q. Will a growth weaken his foot?

A. Of bone? [217]

Q. Will a growth such as this weaken his foot?

A. Not unless inside of these injuries there may be a bony tumor which would weaken the foot, but in a case of this kind, just a deposit of bone, the foot is not weakened by it.

(Testimony of J. H. Mustard.)

Q. The foot is not weakened by it? A. No, sir.

Q. In the case of a fracture of this kind or a broken bone, Doctor, is it usual or unusual for the foot to enlarge? As I understood you to say, in this case, his left foot is enlarged practically one-half inch more than the right foot. Is that a usual or unusual occurrence?

A. Shortly after, during the time the bones are uniting and for some months afterwards, there will be a swelling of the parts affected.

Q. And that eventually recedes, does it not?

A. After some months we can expect that swelling to disappear.

Q. Is that swelling a part of nature's process of healing the wound?

A. No; the swelling is not. The swelling is due to the lessened tone of the soft tissues surrounding the broken bone and the blood serum more readily makes its escape into it and produces the swelling, because of the disuse of the soft tissues.

Q. Because of the disuse? A. Yes.

Q. The swelling of itself is of no particular importance, is it? That is to say, we get a swelling from a blow on our arm, or various things of that kind. The swelling of itself is [218] not of any great importance in this matter?

A. In this matter?

Q. Yes, sir.

A. The swelling has practically disappeared.

Q. The swelling has practically disappeared?

(Testimony of J. H. Mustard.)

A. Yes.

Q. And will eventually disappear entirely?

A. Yes, sir; I expect.

Q. In other words, the half-inch swelling that you have described at the present time is simply a temporary condition, is it not?

A. I didn't say what the half-inch enlargement was due to. I called attention to the enlargement. I never mentioned anything about the swelling at all.

Q. There is no swelling now?

A. As I said before, the swelling has very largely disappeared.

Mr. ROBERTSON.—I think that's all.

The COURT.—Doctor, is it unusual for a man's left foot to be of a different size from the right foot, or the right foot to be of a different size from the left foot?

The WITNESS.—It is very rare that you will find organs of the body that are symmetrical in every respect.

The COURT.—Then this half-inch difference in the size of the two feet might not necessarily occur from this injury?

The WITNESS.—On the other hand, your Honor, there is this definite enlargement of the first metatarsal bone, which is visible, that is not present in the other one.

The COURT.—That's all. [219]

Q. (By Mr. ROBERTSON.) For instance, Doctor Mustard, assuming that you break your wrist

(Testimony of J. H. Mustard.)

and it heals up, even if it is healed and the fractured bone cured completely, isn't that wrist enlarged somewhat by the very fact of its healing up?

A. Wherever a bone is broken, rather, it is the rule with a broken bone, that in the process of healing an excess of callous is thrown out and consequently the bone is almost invariably larger at the point of fracture than it was before.

Q. After it is healed? A. Yes, sir.

Mr. ROBERTSON.—That's all.

Redirect Examination.

(By Judge WICKERSHAM.)

Q. I will ask you if the enlargement which you have pointed out there, on the first metatarsal, next to the second metatarsal bone on his foot, was the result of a fracture of the bone there?

A. There was no fracture of that bone as shown by the X-ray plates.

Q. It was produced as you have already stated?

A. Yes, sir.

(At this point witness replaced shoe on injured foot.)

Testimony of Barnard McHugh, for Plaintiff.

Direct Examination of BARNARD McHUGH Resumed.

(By Mr. WICKERSHAM.)

Q. Barney, I will ask you this question: What have been the expenses of your sickness since the ninth of March last up to date?

A. About \$470.

(Testimony of Barnard McHugh.)

Q. And you say your mother is living?

A. Yes, sir. [220]

Mr. WICKERSHAM.—I want you to ask the witness how much money he has sent to his mother each year prior to that time and how much since.

Mr. ROBERTSON.—Well, now, if the Court please, I object to that as incompetent, irrelevant and immaterial. That is directly appealing to the prejudice and sympathy of the jury. It has nothing to do with this case.

The COURT.—Do you object?

Mr. ROBERTSON.—Yes, your Honor.

The COURT.—Objection sustained.

Mr. WICKERSHAM.—We desire at some time to make that offer in the record.

The COURT.—You can make your offer now.

Mr. WICKERSHAM.—Well, we offer to show that this man's mother is alive, that she is about seventy years old; that she depends entirely upon him for her support, that formerly he has sent her from four to five hundred dollars per annum and that since his injury he has been unable to send her anything.

The COURT.—Offer denied.

Mr. WICKERSHAM.—We take an exception.

Mr. ROBERTSON.—And I will ask the Court that the jury be instructed that so far as the statement of counsel is concerned they cannot accept that as any evidence in the case.

The COURT.—The jury will not consider the statement of counsel at all. It is not any evidence

(Testimony of Barnard McHugh.)

in the case. The Court holds that it is entirely irrelevant.

Mr. WICKERSHAM.—To which we take an exception. [221]

Mr. WICKERSHAM.—That's all. ,

Cross-examination.

(By Mr. ROBERTSON.)

Q. Barney, this noon, when you left the courthouse and went downtown you walked down this street (indicating) here, did you not?

Mr. WICKERSHAM.—I object to counsel's testifying, may it please the Court.

The COURT.—He may answer the question. Objection overruled.

A. I certainly went in front of that door and I went in the center of the street and I walked up in the automobile tire track. Did you expect me to—

The COURT. (Interrupting.) Now, wait a minute.

Mr. ROBERTSON.—Just answer the question.

Q. You followed down the rocky street, did you not?

A. I walked in the automobile tire track, in the center of the street where there was no rock and I took good care not to step on any. I was careful where I set my foot, because I have got good sight to see the street.

Q. You do have good sight?

A. I have got good sight.

(Testimony of Barnard McHugh.)

Q. And you always have had good sight, have you not?

A. Always have.

Q. You did walk down the street though, down the rocky street.

A. I prefer the center of the street rather than to walk on the slippery sidewalk.

The COURT.—He asked you if you walked down the street.

A. I certainly did. [222]

Q. Now, Barney, you say you have been put to an expense of \$470, as I understand it?

A. Yes, sir.

Q. Didn't the defendant pay your hospital bill?

A. I suppose so; I didn't pay it.

Q. Pardon me.

A. I didn't pay it.

Q. Did not the defendant also pay the doctor bill, the bill of the doctors—Doctor Story and Doctor Ellis? A. I suppose they did.

Q. You were not obliged to pay either the hospital bill or the bills of Doctor Story or Doctor Ellis? A. No, sir; I was never asked to.

Q. Now, you told us this morning, in quite a little detail, just where you worked during the past number of years; in fact, since you came from Seattle and before you came from Seattle. Was there any other place where you worked during that period?

A. You mean since I came to Alaska?

Q. Yes, sir.

(Testimony of Barnard McHugh.)

A. Yes; there was one place where I went to work, but I didn't remain for any length of time at that place.

Q. Then the places you named didn't include all the places where you worked? A. No, sir.

Q. Do you recall any other places where you worked?

A. Yes, sir; I went to work up at the Gypsum mine out of Juneau. I went out on one boat and worked four hours and [223] walked away without pay. I didn't like the work; and I also went out here, in 1921, about a week before Christmas, I went out to the Rush & Brown mine and they put me to work sorting ore, and I didn't know anything about it and threw away a lot of good rock. I didn't know ore from waste; so I didn't suit them, and I was there between—the boat goes out there and back every week. I worked four days and I was "fired." He claims I got more ore out on the dump, out on the waste, than I put down in the ore bin.

Q. Now, Barney, as I understand you, you were engaged in the plumbing business at Hyder for for something like, I think you said over a year?

A. I was engaged—I was at Hyder that time, but I wasn't engaged in the plumbing business at Hyder for that length of time.

Q. You were a plumber there for that length of time?

A. No, sir; I went to work there first as a mucker. I said so this morning.

Q. I thought that was the second time you were

(Testimony of Barnard McHugh.)

back. I thought it was when you first came up into Alaska from Seattle?

A. There was no such work going on at Hyder when I first came up in 1916. There was no work of that kind that I know of at all.

Q. How long have you been engaged during your life as a plumber?

A. I worked eleven years in the States as a plumber before I came to Alaska and about three years in England and Ireland.

Q. As a master plumber?

A. I had a shop in Seattle for about 18 months and also in Vancouver for two years and nine months. [224]

Q. As a master plumber? A. No, sir.

Q. Did you do the work of a master plumber?

A. I certainly did.

Q. Handle tools?

A. All kinds of tools handled by any plumber during the years that I worked at the trade.

Q. Did you actually ever do any plumbing jobs?

A. I certainly did.

Q. Did you do considerable work around them?

A. Yes.

Q. Handle wrenches and pipes, and so forth?

A. Yes, sir.

Q. Now, you worked at one time out in Hocky Pass for a logging outfit? A. Yes, sir.

Q. What were you doing there with that logging outfit?

(Testimony of Barnard McHugh.)

A. I bucked wood and split wood and fired the donkey while the donkey was running.

Q. Fired a donkey engine? A. Yes, sir.

Q. How long did you work around the donkey engine?

A. During the time I worked there, of course, the donkey engine didn't work every day.

Q. About how long?

A. Oh, I suppose about four days a week; five days a week.

Q. And you fired the donkey engine?

A. Yes, sir.

Q. During that time, did you run the engine?

[225] A. No, sir; there was an engineer there.

Q. You were helping the engineer?

A. I was firing. The engineer doesn't do any more than just to steer the engine.

Q. Now, then, how were you getting paid for that, by the week or by the month?

A. I was getting paid six dollars for eight hours.

Q. While you were out in the woods?

A. Either in the woods or at the donkey.

Q. But, when you are out at a logging camp, you don't get your pay unless you put in a day's work? A. You work eight hours for your pay.

Q. Yes, sir. And if some particular day you didn't work, you didn't get paid?

A. We worked every day while I was there.

Q. You did work every day.

A. I worked overtime afterward very often and I also got paid for that.

(Testimony of Barnard McHugh.)

Q. Now, during 1921, from January 1, 1921, to December 31, 1921, how much in wages did you earn?

A. January, 1921, I was working at the Premier Mine as a plumber.

Q. How much wages did you earn during that year, the year 1921, the entire year?

A. Well, that I can't very well tell you.

Q. You don't know how much?

A. In 1921, in January, 1921, I got \$7.50 a day for eight hours.

Q. How long did you work?

A. I worked from—I went to work—I worked from January till the last of May.

Q. Did you get in every shift? [226]

A. Got in every shift and lots of overtime. I put in two shifts—I got double shift for one day very often.

Q. How much did you earn?

A. I averaged over \$207 a month clear and my board.

Q. For how many months?

A. From January till the eleventh of May. I was scarcely below \$200 in any one of those months.

Q. For a little over four months, is that right?

A. Yes, sir.

Q. Now, then what did you do after that?

A. Well, sir, I stayed there at Hyder for about two or three weeks and worked again for about two weeks.

(Testimony of Barnard McHugh.)

Q. Where were you working during those first two or three weeks after that?

A. I come down to Hyder the eleventh of May and I laid off for three weeks at the time.

Q. You laid off for three weeks? A. Yes, sir.

Q. Did you earn any money during that three weeks? A. I was taking a rest.

Q. You were taking a rest. A. Yes.

Q. Then, what did you do after that?

A. I went to work again.

Q. Where did you work then?

A. I worked on the road, shoveling gravel.

Q. At Hyder? A. Up from Hyder.

Q. How many days did you put in on that?

A. Oh, just about five weeks, I guess. [227]

Q. What did you get paid at that?

A. I got \$4.75 a day.

Q. Did you put in every day? A. Yes, sir.

Q. Sundays? A. Yes, sir.

Q. Then what did you do after that?

A. I quit the job.

Q. Then, where did you go?

A. I went up to Anchorage, to the coal mines.

Q. Did you come to Ketchikan first?

A. Yes, sir.

Q. Did you rest around Ketchikan for a while?

A. Stayed around here for a week or two—not quite two weeks.

Q. You say you started to go into Mayo?

A. Yes, sir.

(Testimony of Barnard McHugh.)

Q. And you got up to Skagway and got off the boat there, is that right? A. Yes.

Q. How long did you rest at Skagway?

A. I stayed there until I got a boat to take me back to Juneau; then I got the boat, another boat, and went westward.

Q. How long were you in Skagway?

A. Oh, I was there about, there several days.

Q. Nearly a week?

A. About a week, I guess.

Q. How long were you in Juneau?

A. Three or four days. [228]

Q. And then you went over to Anchorage?

A. Yes, sir.

Q. How long were you in Anchorage before you went to work?

A. I was there four or five days.

Q. And then where did you go to work?

A. The Anchorage coal mines.

Q. At what?

A. At the Anchorage coal mines.

Q. How long did you work there?

A. I worked there until about the last days of November.

Q. What time did you go to work?

A. I went to work some time in August, the first of August, I guess.

Q. You worked from the first of August?

A. About. It might be the tenth, ninth or tenth of August the time I went to work. I don't know exactly to a day or two days.

(Testimony of Barnard McHugh.)

Q. About the ninth or tenth of August?

A. Yes, sir.

Q. Up to what time in November?

A. Up to the last days of November.

Q. You think it was past Thanksgiving time or before?

A. Last days of November when the mines shut down.

Q. Then, where did you work the rest of the year?

A. I came down here to Ketchikan and I went to Hyder and stayed there for about two weeks.

Q. What time did you get back to Hyder?

A. Oh, I got back about, around the 20th of December.

Q. Just before Christmas? [229]

A. Yes, sir.

Q. Just before Christmas.

A. Yes; I got back to Hyder earlier than that. I come direct that time. I was only here one night.

Q. How long did you rest over in Hyder?

A. I didn't work there at all.

Q. You didn't work there at all? A. No, sir.

Q. So during the year 1921, the three places you worked were at the Premier mine, then on the road at Hyder and then up at the coal mines, some place near Anchorage, is that correct, Mr. McHugh?

A. Yes, sir.

Q. Did you earn over a thousand dollars that year? A. Yes, sir; I did.

Q. Did you make an income tax report?

(Testimony of Barnard McHugh.)

Mr. WICKERSHAM.—We object, may it please the Court. This is immaterial and irrelevant.

A. There was no—

Mr. WICKERSHAM. (Interrupting.) Wait a moment. That has nothing to do with this case.

The COURT.—Well, he is testing him as to whether he made out an income tax return. He may answer.

Mr. WICKERSHAM.—That includes part of the testimony we were trying to get in. I wanted to ask him how much money he had been sending his mother and the Court wouldn't allow it.

The COURT.—Which?

Judge WICKERSHAM.—What he expended in supporting his family.

The COURT.—Then you can explain it in that way. [230]

Mr. ROBERTSON.—All right. I withdraw the question.

Q. Now, Barney, what work did you do during 1920, from January 1, 1920, to December 31, 1920 the preceding year—the year just before the one you have just told us about?

A. I worked on the road out from Juneau in the winter time.

Q. What time did you go to work for the Alaska Road Commission?

A. I went to work there sometime in December. I know I was there at Christmas time anyway, and I worked there till some time in the middle of March

(Testimony of Barnard McHugh.)

I came down to Ketchikan to go out to Hyder in the spring of 1920.

Q. Then you worked continuously starting sometime in December, 1919, down to March, 1920, for the Road Commission. A. Yes, sir.

Q. Out of Juneau? A. Yes, sir.

Q. What page did you get there?

A. Four dollars and board.

Q. Whereabouts were you working?

A. We were working out at that rock cut, if you have ever been out there.

Q. Whereabouts?

A. Way out as you go towards the glacier. I was out past that cannery—two canneries belonging to—oh, I forget.

Q. You were out to the Auk Ban cannery?

A. This side of the first cannery. There was a rock cut there.

Q. On this side of the lake?

A. This side of the cannery.

Q. Between the lake and the cannery?

A. About this distance from here to the Stedman Hotel from the [231] first cannery where we worked.

Q. Where did you go to work after you left there? A. At Hyder.

Q. Now, then, when you were out on the road, for the Road Commission, did you work every day?

A. Every day; yes, sir.

Q. Then you came into town and laid off?

A. Yes, sir.

(Testimony of Barnard McHugh.)

Q. You are sure of that? A. Yes, sir.

Q. And you put in every day? A. Yes, sir.

Q. Sundays included? A. Yes, sir.

Q. Now, when you came down to Hyder, how long did you rest before you went to work?

A. I was in Hyder about eight days.

Q. How long did you rest in Juneau before you came down to Hyder? A. About a week.

Q. Then you came from Juneau down to Ketchikan? A. Yes, sir.

Q. How long did you rest here?

A. I must have been here about two weeks.

Q. About two weeks.

A. Might be a few days more.

Q. A little over two weeks? A. Just about.

Q. Well, I mean about two weeks or so?

A. Probably so. [232]

Q. Well, then you went over to Hyder. How long did you rest before you went to work there?

A. Eight days.

Q. Well, altogether, you were idle about a month; is that it? A. Just about.

Q. You went to work down in Hyder sometime in April; is that correct? A. Yes, sir.

Q. How long did you work there then?

A. I worked from there— I went to work at the Premier Mine and I worked from that time on, until the eleventh of May next year, 1920, or 1921.

Q. Is that when you did part of the plumbing in the superintendent's house? A. Yes, sir.

(Testimony of Barnard McHugh.)

Q. Now, then, Barney, you remember making out this complaint in this case? A. Yes, sir.

Q. Where was it you signed the complaint?
Where were you when you signed the complaint?

A. Ketchikan.

Q. Whereabouts in Ketchikan?

A. I don't really know. I can't say as to that.

Q. Don't you remember where you were in Ketchikan when you signed the complaint, what building? A. I was up in jail, this federal jail.

Q. You were in jail? A. Yes, sir.

Q. Now, Barney, did you get on a spree shortly after you came [233] out of the hospital?

A. No, sir.

Q. You weren't on a spree for some time shortly after you got out of the hospital? A. No, sir.

Q. You are sure of that? A. I'm positive.

Q. You don't drink? A. Once in a while.

Q. You don't drink except very infrequently?

A. No, sir.

Q. And you are not accustomed to going on sprees? A. No, sir.

Q. How did you happen to be in jail that time?

A. I was found guilty of bootlegging.

Q. Found guilty of bootlegging.

A. Or, in other words, for having beer in my possession.

Q. But you don't drink yourself except very infrequently?

A. Why, yes, I take a drink once in a while.

Q. You do take a drink once in a while?

(Testimony of Barnard McHugh.)

A. Yes, sir.

Q. Well, do you mean that you don't get on a spree frequently?

A. I haven't in eighteen months, anyhow. I haven't in pretty near, not quite pretty near two years.

Q. You are sure you didn't just shortly after you got out of the hospital?

A. No, sir; because I had no money.

Q. Because you had no money.

A. To go on a spree.

Q. That was the thing that kept you from it—a lack of funds? [234] A. I had no funds.

Q. I see. I think you told us this morning that it was pretty hard work climbing around in this town, with so many steps about the town.

A. I don't know that I answered any question like that this morning.

Q. Well, it's pretty hard work for you to go up and down steps here?

A. It is harder for me to go up or down, than it is to come up; that is, it affects me more. I can make it up easier, but I don't say that I can travel a flight of stairs that is so awfully high. It is really more easier and more comfortable for me to go up a stairway than to come down with the way my foot is—the way it affects me.

Q. You don't find it very difficult, then, to come up steps, as a matter of fact? A. Well, yes.

Q. Or to go down either?

A. It affects me to go down.

(Testimony of Barnard McHugh.)

Q. It affects you to go down.

A. It affects my left foot. I haven't got the use of my foot that I ought to have. I have got to use my foot sideways.

Q. You walk down sideways? A. Yes, sir.

Q. Well, now, do you know a man by the name of Mons Halsor? A. Halsor?

Q. Yes.

A. I might know the man. There's a man in this town, I know, that I don't know the name. [235]

Q. Don't you remember a man by the name of Mons?

A. No, sir; I might know the man, but I never heard that name before.

Q. Don't you know that man sitting back next to the window, the open window (pointing)?

A. I know that man, but I never did know his name. I never heard his name mentioned.

Mr. ROBERTSON.—(To man in courtroom.) There, stand up.

Q. You say you didn't know his name?

A. The only name I heard is Ole, but his last name I don't know.

Q. Well, Barney, let it go at that. You go out to Ole's house quite frequently? A. Well, no, sir.

Q. Well, you used to? A. No, sir.

Q. Didn't you, when you first got out of the hospital, didn't you go out to Ole's house or cabin quite a bit? A. No, sir; never been to his house.

Q. Never been there? A. No, sir.

Q. Never have? A. No, sir.

(Testimony of Barnard McHugh.)

Q. You do know where he lives? A. I do not.

Q. Did you know where he lived when you got out of the hospital? A. No, sir.

Q. Have you ever known where he lived?

A. No, sir; I can't say that I do. [236]

Q. Whereabouts was it you lived?

A. I live at the present time up on Mahoney Heights.

Q. Where is that—across the creek?

A. As you go out towards the New England Fish Company; it's to the left of the road as you go out to the fish company.

Q. As you go down towards the New England Fish Company's plant, it's that place that branches off up to the left? A. Yes, sir.

Q. A little distance this side of the New England Fish Company's place?

A. Yes; there is a street that goes up there on the hill. I live in one of those houses.

Q. And you deal down at Sparhawk's for your groceries? A. No, sir.

Q. What place do you deal?

A. I don't deal in any store in Newtown.

Q. You go down there, don't you?

A. I have gone down there off and on, after supper, on different occasions. I go down to see a friend that lives down there by the name of William B——.

Q. You go down there to see Mr. B——.

A. Yes, sir; and very often he goes up to my house.

(Testimony of Barnard McHugh.)

Q. How frequently do you go down to Newtown?

A. Oh, maybe every night after supper.

Q. Every night after supper?

A. Or, I might go down there in the middle of the day, sometimes.

Q. Do you go down as much as twice a day?
[237]

A. No, sir; I scarcely ever go down there more than once. Well, yes; I have gone down there some days more than once.

Q. And you went to work on March eighth, unloading coal on the "Latouche"? A. Yes, sir.

Q. And you worked from then on until midnight?

A. Yes, sir; I worked till twelve.

Q. And you got along all right in your work, did you, Barney?

A. Nobody ever said nothing to me.

Q. Well, did you find considerable difficulty in catching on to the work? A. No, sir.

Q. You didn't? A. No, sir.

Q. You worked, after you got through at twelve o'clock, you got your lunch and went back again at one o'clock? A. Yes; I went back to work at one.

Q. That would be one o'clock in the morning, early in the morning of March ninth, would it not?

A. Yes, sir.

Q. It was shortly after that, I understood you to say, that you hurt your foot? A. Yes, sir.

Q. How many men were shoveling coal into the bucket with you? A. Two men besides myself.

(Testimony of Barnard McHugh.)

Q. Two men besides yourself. Was it that two from seven o'clock to twelve o'clock?

A. Yes, sir.

Q. Was that the two from one o'clock on until the time you got hurt? [238] A. Yes, sir.

Q. And about how long did it take the three of you to load a bucket of coal?

A. Oh, probably five or six minutes. I don't really know. I didn't have no watch and I never timed how long it took me.

Q. Is that about what you estimate—about five or six minutes—to load up one bucket, or tub of coal, I mean? A. Yes.

Q. And between seven and twelve o'clock, when you first went down at seven o'clock, Barney, do you recall all the men that were working down in the hold at that time?

A. There was eight men down in the hold at seven o'clock in the evening, as I went down. I made nine as I got there.

Q. Where was Mr. Pauzi, the longshore boss?

A. Mr. Pauzi, he was on the dock.

Q. He was on the dock?

A. I met him on the gang-plank. You see, he hired me about three o'clock in the afternoon, three or four. He hired me about four hours previous to the time I went to work. He asked me to be back at seven because there were men at work then and they would go to supper at six o'clock and then go off shift and he hired me to go on at seven.

(Testimony of Barnard McHugh.)

Q. You made arrangements about what pay you were going to get?

A. I never asked him about the pay.

Q. He told you you were going to get paid, didn't he? A. Yes, sir.

Q. Did he tell you how much? [239]

A. He hired another man—there was some man he hired just before me. He hired all the men, and I overheard one of them ask him how much they paid an hour on board the boat and he said six bits.

Q. And you understood that you were going to get six bits an hour; is that correct? A. Yes, sir.

Q. Now, of these other eight men, which one of those was boss over you? A. None of them.

Q. None of those men was boss over you at all?

A. No, sir.

Q. And you were all simply working together, is that it? A. No, sir; no.

Q. Well, three of you. There were three tubs and three men on each tub, is that it? A. Yes, sir.

Q. There was none of the men who was boss down there?

A. There was nobody from any of the other buckets tormented us and no one never tormented the rest of them.

Q. You went down and picked out your tub and went to work at seven o'clock?

A. No, sir; I did not.

Q. What did you do?

A. I went down to the tub that there was two men working on.

(Testimony of Barnard McHugh.)

Q. You went down to the tub that there were two men working on.

A. Yes, sir; and I could see a shovel laying there. That was [240] the first thing I asked about as I got down aboard the boat. I knew what we were to do, what I was hired for. I was looking for this shovel and it was laying right alongside, close to the bucket that these two men were shoveling coal into, so I picks it up and I began to figure that that was the bucket I was supposed to work with, where these two men were working.

Q. Was that correct?

A. Yes; that was the place I went to work.

Q. And you fell to work immediately, didn't you?

A. I went to work right there.

Q. And you didn't stop to make any examination of the tub, did you? A. No, sir.

Q. You didn't make any examination of the tub at all? A. No, sir.

Q. You just went right to work? A. Yes, sir.

Q. You worked with the tub from that time on until twelve o'clock at midnight? A. Yes, sir.

Q. I see. And during that time, about how many tons of coal did you, you and your two men that were helping you—and, of course, you were also helping them—how many tons of coal do you suppose you three men got out during that time?

A. I can't tell you.

Q. Do you think that during that time you filled up the tubs at about the rate of a tub every five or six minutes, something like that? [241]

(Testimony of Barnard McHugh.)

A. Well, I suppose it would take between ten and fifteen minutes to make the trip. Of course, if we loaded the bucket in five or six minutes, it would possibly take that much or longer to make the trip up to the hopper and back.

Q. What would you do while the tub was being hoisted up the hopper and before it was returned to you? A. Either stand up or sit down.

Q. During that time you just simply stood and waited until your tub got back? A. Yes, sir.

Q. That is you worked on a particular tub that was your tub to work on, and you kept working on it? A. Yes, sir.

Q. Now, then, whereabouts were you working before you went off shift to go to supper at twelve o'clock—what part of the boat, I mean to say? Were you working amidships? A. Yes, sir.

Q. You were working right in the center?

A. I was in the center, on the starboard side, opposite from the dock. The boat was heading up that way (indicating).

Q. The boat was headed down the channel?

A. In fact, the winchman was facing towards the channel and I was working at his right hand.

Q. When you went back after one o'clock, did you go to the same place? A. Yes, sir.

Q. When you laid off to go and get your supper, where did you leave your tub?

A. Our tub was loaded with coal. [242]

Q. Your tub was loaded with coal?

A. Before we went to supper; yes.

(Testimony of Barnard McHugh.)

Q. Then, when you got—

A. (Interrupting.) It just happened that way. One of the other buckets was hoisting at the time.

Q. When you got back, what did you first do— send that tub up then? A. Yes, sir.

Q. And you hitched the hook on the eye that sticks up above the bail, did you not?

A. Yes, sir.

Q. And in getting the loaded tub out, Barney, would they pull the tub out with the tackle, or would you men take the loaded tub and pull it out?

A. The only thing that we did to it was to hook the hook on.

Q. The only thing that you did was to hook the hook on, and then the winchman would operate the tackle and pull the tub out, is that correct?

A. Oh, he hoisted it right up. It would skid along the floor you see, for a few feet and finally it would raise right up.

Q. And when it was pulled out that way was the bail lying over this way; that is, the handle, this iron part here (indicating), was up here. Is that it?

A. The bail stood directly up at all times while I was working there. It was never lowered toward the floor of the deck.

Q. Even when they were pulling on it, it stood right there?

A. Well, it might move a few inches over from perpendicular, up and down with the force of the pulling. [243]

(Testimony of Barnard McHugh.)

Q. But otherwise it stayed right there?

A. Yes, sir.

Q. Now, the bail, you could put the bail either way, either over this way (indicating) or over that way, towards the lip, couldn't you?

A. That I couldn't answer.

Q. You don't remember that you could take the bail and put it that way or this way?

A. No, sir, I don't know.

Q. You don't know whether they could pull it over toward the lip or not? A. No, sir.

Q. You know they could pull it over this way (showing)?

A. I didn't know at that time, not before it dropped and hit me on the foot, as I never worked with one before. I never worked aboard ship, so I never shoveled coal into a coal bucket.

Q. You never shoveled coal into a coal bucket?

A. No, sir.

Q. And you didn't look at the tub at all?

A. No, sir; I never examined it.

Q. Didn't make any examination? A. No, sir.

Q. And didn't ask the men about the tub?

A. No, sir; nobody ever told me anything about it.

Q. Didn't say anything about it? A. No, sir.

Q. Just simply went to work and commenced to shovel coal? A. Yes, sir.

Q. Now, then, when you got hurt, Barney, you had your left [244] hand, I understood you to say, right on the back rim of the tub, is that correct?

(Testimony of Barnard McHugh.)

A. Yes, sir.

Q. And where were you standing?

A. I was standing at the back, pulling.

Q. You were standing back down in here (indicating) some place, is that it? A. Yes.

Q. And you were pulling on the tub?

A. Yes, sir.

Q. Where was the Indian boy and that other white man?

A. There was one on each side of me.

Q. One of them on either side of you?

A. Uh-huh; on the sides.

Q. You didn't have your right hand pulling on the tub? A. No, sir; I had my left hand.

Q. Just pulling with one hand? A. Uh-huh.

Q. Do you know whether the other two men were standing close to the back, or were they standing up that way alongside of the tub?

A. They must have been on this side; yet I don't know. The only thing I can tell you is that there was one on each side of me.

Q. Barney, how did you happen to get your hand out of the way of the bail when it fell?

A. The bail hit me right here (showing).

Q. The bail hit you right there close to the shoulder? A. Close to the shoulder. [245]

Q. Before it hit your foot?

A. Yes, sir; it skinned me right there (pointing).

Q. Took the skin off?

A. The skin was off for two weeks.

(Testimony of Barnard McHugh.)

Q. Then you were leaning with your left arm clear over on to the tub, weren't you?

A. I had hold of the rim of the bucket.

Q. I see.

A. Pulling on it. That's all I know.

Q. That's all you know—that you were leaning over on it. Were you leaning on it—did you have your hand outstretched this way (illustrating)?

A. No; I wasn't leaning on it; I was pulling on it.

Q. I mean, were you pulling with your arm outstretched or were you up close, leaning your shoulder on it at the time?

A. I might have been turning it. We turned the bucket as we pulled it in order to get it at the proper place and the proper position, and I believe at the time that I was turning it—trying to pull it in that direction.

Q. You were turning it at that time?

A. I might have been.

Q. You are not sure about that? A. No, sir.

Q. And you didn't look the tub over at all, make any examination of it before that time, did you?

A. No, sir; I never looked at it.

Q. And you don't know what was attached to the tub whatever, do you? [246]

A. I never saw nothing attached to it, only the bail.

Q. Did you examine the tub to see what it was like? A. No, sir.

Q. You didn't? A. Never did.

(Testimony of Barnard McHugh.)

Q. You knew the handle was on the tub?

A. I saw the bail.

Q. That's all you know about the tub itself, is that correct?

A. That's all I know about it; yes.

Q. You knew it had wheels, didn't you?

A. Yes.

Q. How did you see this wheel down here (pointing), on the back?

A. The wheel on the back extends past the bucket for about, probably, a half an inch. It was there so that it could be easily seen.

Q. This wheel on the back extended out about a half an inch and you could see it very easily down close to the floor?

A. Yes, sir; you could. You could easily, more easily, I think, than those at the front.

Q. Do you think it was more than a half an inch that it stuck out?

A. Might be two inches for all I know. It seemed to extend out across the bucket.

Q. You think it stuck out a little bit?

A. Yes; it seemed that way.

Q. How far did the wheels on the front stick out? A. That I don't know.

Q. You saw the two wheels on the front? [247]

A. These rollers that was underneath, they must have extended probably four inches high. I don't know, to really say, that they extended out, but at a distance away you can see the roller at the back; you can see it pretty easily.

(Testimony of Barnard McHugh.)

Q. You can see it pretty easily from a distance?

A. Yes; from a distance you can see it easily.

Q. Barney, you know Alice McNutt?

A. Yes, sir; I know something about her.

Q. Pardon me?

A. I know something about her.

Q. Is Alice McNutt a friend of yours?

A. Personal enemy of mine.

Q. Personal enemy of yours?

A. Always has been.

Q. Always has been. A. Yes.

Q. Didn't she live down near your place?

A. She lived about the next house.

Q. She lived in the next house?

A. Last summer for a while.

Q. And she never came over to your house, did she? A. About once or twice.

Q. About once or twice? A. Yes, sir.

Q. And you went over there once or twice?

A. I have been up in her house once.

Q. During last summer? A. Yes, sir.

Q. Now, Barney, I want to ask you if during those occasions [248] you didn't tell Alice McNutt that it was difficult to always keep limping in walking about town because "my," meaning your, "foot is as good as anyone's"?

A. Never told her nothing of the kind.

Q. Never made any such statement as that to Alice McNutt? A. No, sir.

Q. And didn't you also tell her, some time about May 16, 1922. that you had been or were preparing

(Testimony of Barnard McHugh.)

to go out to some camp to work but you changed your mind about it and that while you were able to work, you were going to get wages from the company; that is, the Alaska Steamship Company, all summer, and that you could sell liquor on the side, intoxicating liquor on the side because you could keep up the limping and the Chief of Police and the authorities would have pity on you and in that way you could get by? Didn't you make such a statement as that to Alice McNutt? A. No, sir.

Q. You never told her anything of that kind at all? A. Never said anything of the kind.

Q. Didn't you, also, on or about the same time, Mr. McHugh, tell Mons Halsor, the man that you call Ole, the man that stood up back in the courtroom a few minutes ago, didn't you also tell him the same thing, that your foot was all right, but that you were going to keep on limping because by doing that you could get some money out of the steamship company? A. No, sir; that man accused me—

Mr. ROBERTSON.—(Interrupting.) Now wait—
[249]

The COURT.—Answer that yes or no.

A. No, sir; I never told him.

Q. Never told him that. How many times have you been to Dr. Mustards office, Barney?

A. I have been about on an average, about once in two weeks.

Q. You have been there about once every two weeks. Have you also talked with Doctor Mustard about the case? A. No, sir.

(Testimony of Barnard McHugh.)

Q. Never talked to him about the case at all?

A. Talked to him about my foot.

Q. Just talked to him about your foot?

A. I always told him where it hurted, how much it hurted and so on and so forth.

Q. Didn't you mention the case to him?

A. No, sir.

Q. You didn't make any mention to him about the case? A. No, sir; never.

Q. Now, Barney, I understood you to say that you were working there at the rate of 75 cents an hour? A. Yes, sir.

Q. Seventy-five cents an hour?

A. That is what I overheard the longshore boss tell another longshoreman, another man that was hired there on the evening of March the eighth.

Q. You did have the right to quit whenever you wanted to?

A. A man has got the privilege of quitting whenever he wants to in any work.

Q. And you could quit any time you wanted to on that job, could you not? [250]

A. I suppose so, the same as any other work.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

(Whereupon a short recess was taken.)

Mr. WICKERSHAM.—May it please the Court, I offer in evidence the expectation table, showing the life expectancy of men at certain ages. It may be admitted by the counsel on the other side.

Mr. ROBERTSON.—Now, we object to that as

being incompetent, irrelevant and immaterial in this case. No death has occurred and there is no testimony indicating that the plaintiff's life will be shortened or anything else, by reason of the accident. It's absolutely incompetent, irrelevant and immaterial.

The COURT.—The purpose of counsel is to show the prospective.

Mr. WICKERSHAM.—Injury and damages.

The COURT.—Prospective damages during his natural life.

Mr. ROBERTSON. What have you there?

Mr. WICKERSHAM.—The blue-book of the Equitable Life.

Mr. ZIEGLER.—If the Court please, the further objection is that there is no testimony showing, or indicating that this injury is of a permanent nature or that the expectancy of life enters into it in any manner.

The COURT.—On that question, I'll hear from you.

Mr. WICKERSHAM.—Well, if the Court please, I'll just let that matter stand for the moment. I want to offer some other testimony and there will be a motion and the Court can take the whole matter up then. [251]

Mr. WICKERSHAM.—I desire to offer in evidence the original answer in this case and the amended answer in this case and the affidavit made by Mr. Robertson upon which the amended answer was filed.

The COURT.—What is the purpose of that?

Mr. WICKERSHAM.—The purpose is to show their change of attitude on the matter of the customary manner of the management of this tub, and so forth.

The COURT.—Any objection?

Mr. ROBERTSON.—It seems to me that it is immaterial. I don't see—

The COURT.—I don't see the materiality of it. Objection sustained.

Mr. WICKERSHAM.—Well, aren't the pleadings always in evidence, may it please the Court?

The COURT.—The pleadings are always before the Court, but I don't see how it is material—any change.

Mr. WICKERSHAM.—Well, they make one statement at a *certain and* then they come in subsequently and change it. I don't like to make it stronger than that before the jury, but that is the situation.

The COURT.—Well, you may make the offer and I'll hear you on the argument.

Mr. WICKERSHAM.—Then I offer to introduce the original answer in this case, the amended answer of the defendant and the affidavit of Mr. Robertson upon which the amended answer was allowed to be introduced.

Mr. ROBERTSON.—We make the objection to that that it is immaterial. [252]

The COURT.—You rest, then?

Mr. WICKERSHAM.—So far as our evidence

is concerned. With the exception of passing upon these matters, we rest.

The COURT.—All right, the jury may be excused for a short time.

(Whereupon the jury retired.)

The COURT.—I'll hear you on the first question as to whether there is any evidence tending to show the permanency of the injury.

Mr. WICKERSHAM.—Well, Doctor Mustard swore that, I think, quite positively.

The COURT.—He did not, as I understood his testimony. He swore that he couldn't tell whether it would be permanent or whether it would heal.

Mr. WICKERSHAM.—No; he swore that the bone would always remain there, just as it is. That is what he swore to, but he said that he couldn't tell how, in the course of time, the presence of that bone might affect it; that it might, through use, cease to hurt him, but he couldn't tell about that; but the bone, he said, was permanent, because I asked him about that especially.

The COURT.—This testimony goes not to the injury to the bone, but it goes to his earning capacity, and there is no testimony here showing that his earning capacity has been permanently impaired, or showing that the deprivation of his earning capacity will be permanent. This excrescence or growth may be permanent, but that does not necessarily destroy his earning capacity in the future. He said that he could not tell whether it

would or not; that it may become so that it will not hurt him or not interfere. [253]

Mr. WICKERSHAM.—It might.

The COURT.—And I don't see how the testimony is material. It is a matter that the jury can take into consideration. They would first have to determine from that that his earning capacity was destroyed for all his future life. There is nothing in the testimony showing that or his expectancy.

Mr. WICKERSHAM.—The purpose of offering the testimony, may it please the Court, was to show that this man would live a certain length of time ordinarily after this time.

The COURT.—Yes.

Mr. WICKERSHAM.—That's all I offer it for.

The COURT.—That is, for the purpose of showing his earning capacity?

Mr. WICKERSHAM.—Not at all.

The COURT.—Then, what is the purpose of it.

Mr. WICKERSHAM.—The purpose of it is to show that ordinarily he will continue to live for many years.

The COURT.—Yes.

Mr. WICKERSHAM.—Then the evidence we have introduced shows that the injury to the foot is permanent and that in those years he will have that permanent injury on his foot. Now the doctor did say that he could not say positively that he might recover at some time in the future.

The COURT.—I sustain the objection.

Mr. WICKERSHAM.—We take an exception. Now, with respect to the pleadings, of course, the authorities are all one way—that the pleadings may be offered. [254]

* * * * *

The COURT.—I don't think it could be brought in in the way of impeachment. Of course, all the pleadings in the case are a part of the record in the case and under certain circumstances they may be introduced in evidence, and they may be read to the jury and the pleadings may be read by the counsel and commented upon, without being introduced in evidence.

Mr. WICKERSHAM.—That's all I desire to do, may it please the Court.

The COURT.—You may introduce the original complaint, if you so desire.

Mr. WICKERSHAM.—The original answer you mean.

The COURT.—The original answer, if you so desire, in evidence, but the other answer is a part of the record in the case and may be read, may be commented upon with reference to the original answer.

Mr. WICKERSHAM.—Then will it be admitted?

The COURT.—It will be admitted—the original answer.

Mr. WICKERSHAM.—And we will be permitted to use the other answer and comment upon it?

The COURT.—Certainly.

Mr. ROBERTSON.—Then I understand, if the

Court please, that the plaintiff will also be bound by that original answer. They have made that a part of their case in chief and necessarily they will be bound by it.

Mr. WICKERSHAM.—We have stated to the Court why we offer it.

* * * * *

Mr. ROBERTSON.—We take an exception to that. [255]

The COURT.—I believe I'll reverse that ruling, strike out the amended answer and deny the motion.

Mr. WICKERSHAM.—We take an exception.

The COURT.—It may be introduced in rebuttal. Whereupon the plaintiff rested.

Mr. ROBERTSON.—The defendant at this time moves the Court that a judgment of nonsuit be entered in favor of the defendant and against the plaintiff.

The COURT.—Is that all your motion? What are your grounds?

Mr. ROBERTSON.—If the Court wishes to hear me?

The COURT.—I'll hear you.

Mr. ROBERTSON.—Our point is simply this, that the plaintiff has entirely failed to bear out or support the burden of proof as thrown upon it in such cases as this. In the first place there has been no negligence shown, we contend, on behalf of the defendant; there is no negligence brought home to the defendant in the case in any manner whatsoever; that while it is true there was someone, I

don't recall which witness testified at one time that he spoke to someone at some time, he also stated he did not know who it was and he did not state who it was. That first gentleman, Mr. Young, who testified about the bucket on the afternoon of the day before, said that he himself had kicked about that as much as anybody, but he gave no testimony that any notice was brought home to the steamship company.

Now, if the Court please, assuming that we are mistaken on that point, the point is simply this: that the negligence, if any, arose in this case out of the lack of ordinary and [256] reasonable care by the plaintiff himself. The evidence discloses by the witness Soderberg that whatever defect was in the bucket could have been easily seen and that is certainly corroborated by the witness Young; that if there was any defect, it was easily seen; also by the witness Gillis, but the witness Soderberg testified directly that the defect was plainly visible and discernible.

Now, so far as any question in this case is concerned about the place in which they were working being a safe place to work, there is no evidence of that whatsoever. The evidence from the witness-stand, so far as my recollection serves me, is, on the contrary, that it was a well-lighted place. The first witness on the stand testified as to the glare of the lights. Plaintiff himself testified that he could see; that he could even see the wheel; he could easily see the wheel at the rear of the tub down

near the floor. He also testified that his eyesight was good. Now, he also testified that he has had a good deal of experience in various capacities, not simply as a common laborer, but in work of a higher type than common labor. Now it is true that he claims that in this kind of work, unloading coal, that was his first experience, but after all he had worked, as he said himself, five hours and going on the sixth hour, according to his own testimony, before the accident occurred. Now, then, he said that he had handled plumbing tools, pipes and things of that kind. He gave us a long description, on direct examination of the piping that he put in, as I understand, up at the Kennecott mine, or some other place. Therefore, it was incumbent on [257] him, as a matter of fact, when he went into that place, to examine the tools with which he was to work and to discover any patent defects, and it was very aparent to the other witnesses that this was a patent defect, and then he comes on the witness-stand and admits that he made no effort whatsoever himself to make a discovery as to whether there was anything wrong with the tub. Furthermore, the tub itself was used over a long period of time without any injury or harm, and at night, when he went on, one of the men working with him said that he had noticed that the first tub there happened to spill and yet this man even after that continued to work with it and he doesn't claim that he made any protest to anyone about the tub, and we believe that the law, when applied to those

(Testimony of O. W. Pollow.)

facts, fits in squarely on the proposition that he has failed to use the ordinary care and the reasonable care required of him as a workman and that at this time he is not entitled to have the case go to the jury.

(Whereupon, after argument, motion for nonsuit was denied.)

Mr. ROBERTSON.—We take an exception, to the Court's denial of our motion of nonsuit.

And thereupon, the jury being present in the box, the defendant to maintain the issue on its part, introduced the following evidence, to wit:

Testimony of O. W. Pollow, for Defendant.

O. W. POLLOW, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Will you please state your name? [258]

A. O. W. Pollow.

Q. How old are you? A. Forty-three.

Q. What is your business or occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. About fifteen years.

Q. In what waters? A. Why—

Q. (Interrupting.) Whereabouts? What is the scope of your master mariner's papers?

(Testimony of O. W. Pollow.)

A. Thirteen years on Puget Sound and two years in Alaskan waters. No, sir; put in more than that. I'll take that back.

Q. How many years altogether?

A. I have had about three years in Alaskan waters.

Q. About three years in Alaskan waters?

A. Yes, sir.

Q. How many years altogether have you been a master mariner? A. About fifteen years.

Q. How many years altogether following the sea? A. About eighteen, nineteen years.

Q. Prior to being a master mariner, what position were you in?

A. Why, I was a sailor most of the time; that is my experience on the water.

Q. That is what I mean. In whose employ are you, Mr. Pollow?

A. I have been, for the last ten years, in the employ of the Alaska Steamship Company.

Q. Were you in its employ on March 8 or March 9, 1922? [259] A. Yes, sir.

Q. In what capacity?

A. I was third mate of the steamer "Latouche."

Q. Were you in Ketchikan on March 8 and 9, 1922, when the steamer "Latouche" was in port here? A. Yes, sir.

Q. Are you familiar with the steamer "Latouche"? A. Perfectly.

Q. How long have you served on her?

A. About ten months.

(Testimony of O. W. Pollock.)

Q. About ten months? A. Yes, sir.

Q. Altogether? A. Altogether.

Q. Are you familiar with the position of her decks and hatches and things of that kind?

A. Yes, sir.

Q. I will ask you, Mr. Pollock, to look at this plat and state whether or not, from your knowledge of the steamer "Latouche" and having examined the plat, that is a correct plat of the steamer "Latouche"?

A. This is a correct plat of the loading chart of the steamer "Latouche."

Q. Where did the plat come from?

A. It come from the Alaska Steamship Company.

Q. Where did you get the plat?

A. I got it off the steamer "Latouche."

Mr. ROBERTSON.—Now, we would like to introduce the plat in evidence in connection with the witness' testimony. We just want it for the purpose of illustration. Do you have [260] any objection?

Mr. WICKERSHAM.—No; I am not making any objection. I don't desire to waive it.

The COURT.—You want to introduce it simply for the purpose of illustration?

Mr. ROBERTSON.—That's all; simply for the purpose of illustration.

The COURT.—Just mark it for illustration. It is not introduced in evidence.

(Testimony of O. W. Pollow.)

Q. What was the "Latouche" doing in port on those days? A. Unloading cargo.

Q. What kind of cargo?

A. Why, coal and general merchandise, powder.

Q. Now, from what hatch were you unloading coal? A. No. 2 hatch.

Q. Will you kindly step down and show on the chart where the No. 2 hatch is?

A. This is No. 2 hatch, here (indicating).

Q. Designate it by the words No. 2.

A. Here (marking).

Q. Now, what does this plat show?

A. That shows the 'tween-decks.

Q. What is the next one below that?

A. That shows the 'tween decks.

Q. What does the next one show?

A. That shows the hold.

Q. What does the bottom one show?

A. That shows the side view.

Q. That is the profile of what ship?

A. Of the "Latouche." [261]

Q. Now, then, on what deck was it that the coal was being discharged from?

A. On the 'tween-decks.

Q. On the 'tween-decks, out of the No. 2 hatch?

A. Yes, sir.

Q. Do you know how much coal was discharged at Ketchikan that trip? A. About 400 tons.

Q. At what dock did the ship lay while she was discharging coal?

A. The Ketchikan warehouse; Ketchikan dock.

(Testimony of O. W. Pollow.)

Q. Ketchikan dock here, right on the Narrows?

A. Yes, sir.

Q. Can you recall at this time as to which way her bow lay, which side of the bow was alongside of the dock?

A. Laying on the port side; left-hand side to the dock.

Q. Which way is it customary to land at these ports or port? A. That depends on the tide.

Q. That depends on the tide? A. Yes.

Q. Now, then, were you on shift at any time while the cargo of coal was being unloaded?

A. I was on shift when we first started to unload.

Q. You were on shift at the beginning?

A. Yes, sir.

Q. Now what are your duties as third mate?

A. My duties on the ship, when she is in port, is, when she is in port and in charge of my watch, handling freight and taking care of the deck machinery and freight and when she [262] under way, I assist in navigating the ship.

Q. Now, when you were in port at that time, at what time did you go on watch?

A. I go on watch at twelve o'clock.

Q. Did you on that occasion, I mean?

A. Yes, sir.

Q. You mean twelve o'clock noon or twelve o'clock midnight? A. Both.

Q. You go on shift.

A. I work from twelve o'clock until four twice a day.

(Testimony of O. W. Pollow.)

Q. I see. A. Making eight hours a day.

Q. Now, was that the situation on this particular occasion? A. Yes, sir.

Q. What time did you commence to discharge coal, do you recall now? A. Not exactly.

Q. I will ask you, Mr. Pollow, do you have with you the log of the steamship "Latouche"?

A. Yes, sir.

Q. That you used at that time. Did you assist in keeping the log? A. At all times.

Q. That is to say, when you are on shift, what, if anything, do you have to do with the keeping of the log?

A. I have to keep the log on my watch on deck at all times.

Q. Keep the log at all times. A. Yes. [263]

Q. By turning to the log, can you refresh your memory as to just when you started to unload the cargo?

A. Certainly. (Looking at log-book.) We arrived at Ketchikan at ten thirty A. M., March 8.

Q. What time did you start to unload or discharge?

A. We commenced to discharge coal at 1:15 P. M.

Q. What day? A. March eighth.

Q. March 8, 1922? A. 1922.

Q. Now, do you recall, Mr. Pollow, what crew, if any, were working, discharging cargo that afternoon?

A. That afternoon we was using the ship's crew and some longshoremen to fill out.

(Testimony of O. W. Pollow.)

Q. You were using the ship's crew and some longshoremen to fill out. A. Yes, sir.

Q. What, if anything, did you do in the evening?

A. At six o'clock we knocked off for supper.

Q. At six o'clock you knocked off for supper.

A. Yes, sir.

Q. When did they go back to work again?

A. At seven o'clock.

Q. Now, then, were you on shift at that time?

A. No, sir.

Q. When did you next go on shift again?

A. At midnight.

Q. But you were on shift up to what time in that afternoon? A. Four o'clock. [264]

Q. Until four o'clock in the afternoon?

A. Yes, sir.

Q. Now, do you recall, during that time, Mr. Pollow, as to how many tubs, if any, were being used in discharging coal? A. Three tubs used.

Q. Now, are you familiar with the coal tubs that are used for the discharge of coal?

A. Some; yes.

Q. How did you gain that familiarity, will you please tell the jury? How did you get your familiarity with coal tubs?

A. By working with them.

Q. In what capacity?

A. As mate, second mate and third mate.

Q. How extensive has been your use of coal tubs?

A. Well, in the two years' experience that I have had, we haven't made but one or two trips

(Testimony of O. W. Pollock.)

without coal and we never take less than 250 tons and from that up to 2400 or 3,000 tons.

Q. Have you personally handled coal tubs?

A. Yes, sir.

Q. What have you done with them, or have you had occasion to do with them?

A. I have acted as the man on the dump to dump the coal.

Q. That is, you mean, as hopper man?

A. Well, yes; I have relieved the hopper man for lunch at times.

Q. What did you mean when you said you acted as the man on the dump?

A. Well, there's lots of times we don't dump in the hopper; we dump right on the pile of coal on the dock; deliver the [265] coal on the dock—loose coal.

Q. Now, then, do you know the general construction of the coal tubs used by the Alaska Steamship Company? A. Yes, sir.

Q. Did you know the general construction of coal tubs used by it on the steamer "Latouche" on this particular occasion? A. Yes, sir.

Q. Were you familiar, or are you familiar with those tubs? A. I was perfectly familiar.

Q. You were perfectly familiar? A. Yes, sir.

Q. And how many were there? A. Three.

Q. How many of them were being used?

A. Three.

Q. Where were they being used?

A. Being used in No. 2 hatch for unloading coal.

(Testimony of O. W. Pollow.)

Q. Now, then, I'll ask you to look at this drawing here that has been used in illustration of the coal tub in question, Mr. Pollow. Will you kindly step down here and explain to the jury wherein, if in any place, that tub differs from the tubs that were in use on the steamer "Latouche" on March eight or ninth, 1922.

A. This (pointing) patent locking device is entirely on the wrong side of the bail.

Q. How was the patent locking device put on?

A. It was fastened to the bail with a small structure here to hold it in place (indicating) and it tripped across here on a block on the outside of the bail. There was a block here [266] (indicating) that caught the bail and kept it from going forward and the trip was hooked over the same block.

Q. Do you notice anything else on that illustration besides what you have mentioned?

A. Well, it had a little—it had little handholds here (showing).

Q. What were those handholds made of?

A. Round iron, a little bit heavier than that (showing); just a nice handhold so that you could take hold of it and pull the tub forward, and then on those wires were fastened a little becket, possibly two feet along that hung down here to take hold of to drag the bucket forward with.

Q. What do you mean by becket?

A. I mean the small piece of line that is made fast there for that purpose.

Q. A piece of rope?

(Testimony of O. W. Pollow.)

A. The rope, yes, two-inch rope or a two and a half inch rope.

Q. Do you know whether or not— What is the usual term aboard ship used to describe such a line as you have just mentioned? What is it usually called? A. A hand becket.

Q. That is called a hand becket? A. Yes.

Q. Do you know what it is they call a grommet?

A. A grommet?

Q. Yes, a grommet.

A. That is a sling; an ordinary cargo sling would be a grommet. Anything fastened together to make a complete circle would be a grommet.

Q. Did you hear Mr. Young's testimony about something that was [267] kind of like a doughnut, cut out like a little wheel on the outside?

A. Yes, sir.

Q. What do you call those things on board ship?

A. Well, I don't know just now what it might be, but that would be as near a grommet as you could get.

The COURT.—Mr. Young was testifying to the iron on top of the bail.

Mr. ROBERTSON.—Perhaps I may have misunderstood him.

Q. There was an eye up here? A. Yes, sir.

Q. Now, Mr. Pollow, have you drawn a rough plan or chart of the tubs that were in use at that time?

A. I have just drawn one on a sheet of paper.

Q. Have you got it with you? A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. Well, will you let me see it? A. Yes, sir.

Q. Now, Mr. Pollow, is this drawing drawn to scale? A. No, sir.

Q. Is it intended to be anything more than a rough— A. (Interrupting.) Just approximate.

Q. (Continuing.) Representation?

A. Just a rough representation of the bucket.

Q. Does it correctly or incorrectly depict the kind of coal tubs that were used on the steamer "La-touche" on March eight and ninth in Ketchikan?

A. As near as I could draw it to its exact, to the exact coal bucket in every way.

Q. Without drawing it to scale? [268]

A. Yes.

Mr. ROBERTSON.—I am going to ask to have it used for the purpose of illustration. Is there any objection?

Mr. WICKERSHAM.—Yes; I object to everything.

The COURT.—What's that?

Mr. ROBERTSON.—Well, he objects to everything.

Mr. WICKERSHAM.—Well, I mean by that, may it please the Court, that I don't want to be bound by anything.

The COURT.—It may be received. You want to use it for the purpose of illustration?

Mr. ROBERTSON.—Yes; your Honor.

The COURT.—It may be received for the purpose of illustration.

Q. I will ask you to kindly step down here again

(Testimony of O. W. Pollow.)

for a moment, and step to one side so that the jury can see. What different views there have you depicted of the tub?

A. This is the bucket standing on deck, with a side view (showing); and this is the bucket standing on deck with a front view (showing).

Q. What is the other?

A. This is the bucket hanging on the cargo hook.

Q. Well, now, if you turn it that way, what does it depict?

A. That way, it shows the bucket being dragged from under the deck.

Q. By what? A. By the winch or the falls.

Q. I will ask you whether or not this shows this trip that you are referring to on this bucket here?

A. Yes, sir. [269]

Q. Now, I will ask you to point that out to the jury, where that is shown.

A. Here is the trip here (indicating); runs up here and crosses the bail right there. It is fastened on to the bail. There is a little block right in there (showing) where the hook hooks over.

Q. Now, mark that with an A or B to indicate that.

A. This, where the hook hooks over the block, I have marked "trip."

Q. "Trip"? A. Yes.

A. Now, then, referring to this illustration, this chart that you are using and the one on the black-board, which one of them depicts a correct repre-

(Testimony of O. W. Pollow.)

sentation of the coal tubs that were being used on the "Latouche" on that trip, on that occasion.

A. This is nearer like the coal tub used, while this (indicating) is a better drawing; but this (indicating) is nearer like the shape of the bucket and this is nearer like the shape of the trip.

Q. How about with reference to the position of the trip?

A. Well, the trip in this position, doesn't show where it is made fast, and in case you pull this way on this trip, it would have a tendency to lock the bucket. I don't see how that could work at all.

Q. Now, then, how does that trip operate?

A. This trip, by pulling this lever this way, lifts that hook and lets the bail hang loose.

Q. I see. What, if anything, was there on the front part of [270] the bucket, on the lip or near the lip?

A. On the front part was these little hand irons here to take hold of.

Q. Have you indicated those?

A. I put "pull beackets" here (showing). I haven't marked the little hand irons themselves.

Q. Now, then, how many wheels do the buckets have? A. Three wheels.

Q. Where are they located?

A. One on each forward corner and one on the middle, at the back of the bucket.

Q. Could you see the one in the back?

A. Well, from a side view, if you were standing perfectly abreast, away from the bucket a ways, you

(Testimony of O. W. Pollow.)

could see it, but just a little over and you couldn't see it unless you were on the back side of it.

Q. What is the customary way of discharging a coal bucket after it is loaded, Mr Pollow?

A. Well, it was hoisted up with a double winch and it was hoisted over a hopper, as we did here, and the man on the hopper dumped the bucket into this hopper, and it was an open-bottom hopper and there was a car running under this hopper and that dumped coal in this hopper went into the car, and they wheeled it into the warehouse and dumped it.

Q. Now, then, I understood you to say that you were discharging coal out of No. 2 hatch.

A. Yes.

Q. Whereabouts, show on the chart, if you can, approximately where the coal pile was that was being unloaded or taken off. [271]

A. The coal pile was on this deck, between decks, right across here (showing).

Q. Where was it when you first broke, took off your hatch cover to break—

A. (Interrupting.) When we first took off the hatch cover, the coal was all over here (indicating).

Q. Where, if you know, did the winchman stand that operated the winch, with the tackle and all, that brought the tubs up?

A. The winchman stood right here (indicating) between this mast and the edge of the hatch. In fact, he was right on the edge of this hatch.

Q. Where was the boom or falls from which you were operating, by which this coal was brought up?

(Testimony of O. W. Pollow.)

A. This represents the masts. The boom ran off from there and went up on the dock and the other one went over this way on this side of the ship, over this way (indicating).

Q. Where, on the steamer "Latouche," is the forward mast? A. The foremast is right here.

Q. You went off shift at four o'clock in the afternoon? A. Yes, sir.

Q. And then when did you go back again?

A. At midnight.

Q. What, if anything, happened in the way of your work between twelve and one o'clock, as to whether it continued or ceased?

A. At twelve the men quit for lunch.

Q. When did they go back to work again?

A. At one o'clock.

Q. Who was on shift as mate at that time?

A. I was on shift as mate. [272]

Q. You were on shift as mate. A. Yes.

Q. How many buckets were being operated at that time? A. Three buckets.

Q. How many men in the hold?

A. There were nine men in the hold.

Q. Who were those men? I mean to say, with respect to what class of men were they?

A. They were all longshoremen.

Q. They were longshoremen. Was Barney McHugh with them?

A. Well, I understood later he was. At that time I didn't know.

(Testimony of O. W. Pollow.)

Q. At that time you weren't personally acquainted with him?

A. I didn't know what his name was.

Q. Then, when you came on shift and the work started, Mr. Pollow, I wish you would kindly explain to the jury just how, if at all, the place where the men were working was lighted.

A. We have a cluster of lights—

Q. (Interrupting.) No, referring to this particular occasion, now.

A. We have a cluster of lights—we have eight sets of cluster lights about—they were in a disk about this large (showing) and all the way from five to seven and eight lights in a cluster—

Q. (Interrupting.) Now, pardon me, what size globes or lamps are they? A. They were—

Q. (Interrupting.) I mean with reference to candle-power or watts?

A. They were 40-watt globes. [273]

Q. Forty watts.

A. Uniform globes on all boats.

Q. What, if anything, is on the back of the lights, or the cluster?

A. There is a reflector in the back of this cluster.

Q. Very well.

A. Now, they were placed where the winchman stood; there was one cluster hanging in each hatch coaming, tied up slightly forward to shine down on this coal pile, and forward under the hatch, where they were working under this hatch, and there was one cluster of lights hanging in either wing, shining

(Testimony of O. W. Pollow.)

on the coal pile, and then there was a light here (indicating). We often had a light— I don't remember whether the light—

Q. (Interrupting.) Never mind if you don't know about it. Now what, if any stationary lights were there in the hold at that time?

A. There were lights about every twelve or fourteen feet. I don't know exactly how far they were apart, but nearly that under the deck and in each wing, shining down on the deck.

Q. Now, what, if anything, would those lights do with reference to making the place where the men worked dark or light?

A. They would make it very bright. You could see in all directions.

Q. Now, how was the work going on down in the hold? I mean by that—you say there were three tubs down there. What, if anything, was done with the tubs relative to working helter-skelter or on some kind of plan. [274]

A. They took the tubs out in uniform rotation there. They would take out one, send it up and send it back; take this one up and dump it and send it down, and then take out the third one and send it back in rotation and come back to this one again.

Q. When you say this one I wish you would designate it in some way.

A. Well, for instance, we'd start with the one in the port wing first, take that up on the dock and dump it and bring it back and load it; then take the one from amidships, hoist it up on the dock and

(Testimony of O. W. Pollow.)

dump it and bring that back and load it, and then take the one from the starboard wing, hoist it up and dump it and bring it back and then go on over the same routine again.

Q. How many tubs, Mr. Pollow, do you discharge in an hour? A. Oh, I should judge about thirty.

Q. How many tubs of coal did you discharge an hour? A. About 25, 26, 27.

Q. During the period from one o'clock on, how many tubs were being used for, say, the next hour?

A. From twelve o'clock on—

Q. (Interrupting.) I mean from one o'clock on. I beg your pardon.

A. From one o'clock on, there were three tubs being used.

Q. And at about what speed were they being operated, if you recall at this time, on that particular occasion? A. About the usual speed.

Q. Now, then, Mr. Pollow, with reference to these tubs, do you [275] know whether or not there is any difference between operating the tubs, in the moving of the tubs, as to whether or not they are moved with the rear going forward or with the front going forward, do you know that?

A. There is a big difference, yes, sir.

Q. What is that difference?

A. There is nothing to pull on if you pull it sternward.

Q. When you say there is nothing to pull on, what do you mean by "nothing" but what?

(Testimony of O. W. Pollock.)

A. But the rim of the bucket; grab hold of the bucket or take hold of the bail and pull on it.

Q. How could you take hold of the bail?

A. That is very simple. Just grab hold; one man on each side, take hold of the bail and pull on it.

Q. What is there for pulling it with the lip forward?

A. With the lip forward, you have your hand beackets here (indicating) to pull on.

Q. When the tubs come back down, after having been dumped, into the hold, what is customary with reference to moving them back into the hold, as to what manner they are moved in?

A. When they are landed in the hold, one man unhooks the bucket and the other two men simply get the bucket up to the coal pile.

Q. What direction do they move it in?

A. The best way to move it is with the lip forward.

Q. Why so? A. Easier to handle.

Q. Why is it easier to handle? [276]

A. Because you have your beackets to pull on.

Q. How many wheels are there at the rear?

A. There is one wheel at the rear.

Q. How many at the front?

A. Two at the front.

Q. What, if any, difference does that make in the pulling of it?

A. I don't know that it would make any difference in the pulling of it.

Q. Now, then, when the tub comes out from un-

(Testimony of O. W. Pollow.)

derneath the hold, after it is loaded, how is it taken out?

A. Well, it is under the deck. It has to be dragged from in under the deck on account of this bail. They unhook it, let it flop down loose, then they drag the bucket right out until it gets out under the fall; then they latch it and they first put that safety on and take the bucket out.

Q. How is it pulling on it with—what effect does the pulling on the bail by the hook have on the bail itself with reference to any movement? You understand what I mean?

A. What effect it would have?

Q. Yes.

A. When it is down or when—?

Q. Yes; when it is down and being pulled out?

A. It gives a direct haul from the center of the bucket. If the bail was not let down it would tip the bucket over forward or would pull it.

Q. Do you know from your experience with coal buckets as to what is the safe manner of using them and what is an unsafe manner of using them?
[277]

A. Yes.

Q. What is the safe manner of using them?

A. At any time after those buckets are lowered into the hold, why, if you get on the forward side of this bucket and pull on these beackets, there is no chance of any danger whatever.

Q. Why it that?

A. Because the bail is fixed so that there is a

(Testimony of O. W. Pollow.)

block there. The bail cannot go forward. The bail must fall backwards if the bail should fall anyway at all. If a man stands on this side (indicating), he can't get hurt.

Q. If the trip was taken off, would the bail move forward?

A. The bail can never move forward because that block is stationary, made fast to the bucket itself. The bail cannot go forward at any time.

Q. Could the bail go forward if the trip was defective or taken off altogether? A No, sir.

Q. Why is that?

A. Because that block is there, stationary, bolted on to the machine, bolted on the bucket and it cannot—the bail cannot go forward at any time.

Q. Now, then, how many men does it require to handle one of those buckets when it is empty?

A. Well, one man can handle a bucket.

Q. How do you know that?

A. Because, I have handled them myself.

Q. How many men generally handle them when they are down in the hold working on them?

A. We generally have three men on them. [278]

Q. What do they do?

A. Well, as a rule, there is one man unhooks the bucket and the other two drag it on to the coal pile.

Q. Now, Mr. Pollow, on this night, or at the time of discharging this coal, did you ever have any occasion to say anything to any of the men working in the hold with reference to the operation of the bucket? A. Yes, I did.

(Testimony of O. W. Pollock.)

Q. What, if anything did you tell them?

A. I always say more or less to them in regard to handling the buckets. I always have to break them in, lots of times, when they are new men.

Q. What, if any, instructions did you give these men?

A. I told them on different occasions to turn the bucket around so they could pull it. They would have to get the tub in shape so they could get it under the deck.

Q. And you told them to turn it around so they could pull it? A. Yes.

Q. Turn it around, in what way? How do you mean?

A. Those buckets don't always land with the lip the same way and lots of times they land backwards, so that the back of the bucket is where the nose ought to be.

Q. Yes, sir.

A. So they have to turn the bucket around, drag it into place and it is much easier shoveling into the bucket with the nose next to the coal pile than it is with the back.

Q. Why is that?

A. The back is perpendicular and the bail is closer to the back of the bucket than it is to the front. There is more [279] room to shovel up into the bucket from the front end.

Q. Do you know whether or not you told the plaintiff McHugh, gave him instructions.

A. I told that gang in which he worked.

(Testimony of O. W. Pollow.)

Q. Were all the men there, the nine men.

A. Nine men were in the hold at that time.

Q. Did you say it in a low or loud tone of voice?

A. I always speak loud to them so they can all hear.

Q. Where were you when you were speaking to them?

A. I was standing in the square of the hatch on the coal pile.

Q. On the what? A. On the coal pile.

Q. You mean by that that you were below the main deck.

A. Below the main deck, up where they were working.

Q. What, if any, instructions did you give them, relative to using the tackle on the tubs? Did you have any occasion to give them any instructions relative to that? A. The bail you mean?

Q. Yes.

A. I told them to let that bail down. They didn't know how to do that until after I told them; let the bail down and drag the bucket out.

Q. Now, then, Mr. Pollow, what, if anything, occurred there after you went on shift relative to McHugh?

A. Well, about an hour after he went on shift, the man got hurt.

Q. Where were you at the time he got hurt?

A. I was— I must have been right on the dock at that time.

Q. Did you personally see him get hurt?

(Testimony of O. W. Pollow.)

A. No, sir.

Q. You didn't see it? [280] A. No, sir.

Q. What, if anything— Where did you go immediately after that?

A. I was coming aboard when I saw him limping on deck, and leaning up against a life-boat there.

Q. Do you know what bucket it was he claimed to have been hurt with? A. Yes, sir.

Q. Were you familiar with that bucket?

A. Yes, sir.

Q. How did that bucket differ from the other buckets by the bail not being able to go forward?

A. Not a bit.

Q. Could the bail on that bucket have fallen over the lip of the tub? A. No, sir.

Q. Why not? A. Because that iron block that is attached to the bucket wouldn't let it go forward.

Q. What, if anything, was on that bucket by which it could be handled?

A. You would have the pulling beackets on it.

Q. What do you mean by "pulling beackets"?

A. Those ropes hanging down forward, on the front end of the bucket.

Q. Now, did you make a hasty scrutiny of the tub to ascertain that fact?

A. At the time of the accident?

Q. Yes, sir. A. No, sir. [281]

Q. What did you do? Did you look at it carefully?

A. Why, I know the tub was all right at that

(Testimony of O. W. Pollow.)

time, because they were all alike. There was nothing wrong with them; they were fixed.

Q. Did you see this particular tub?

A. Yes, sir.

Q. What, if any, occasion did you have to look at the tub before the work started at one fifteen the preceding day, March eighth.

A. Oh, I didn't examine the tubs closely at any time.

Q. Where were you during the work?

A. I was right amongst the men and on the dock; on the boat and amongst the work all the time.

Q. What, if anything, was called to your attention by any of the men to the effect that the tubs or any of them were defective?

A. Why, when McHugh got hurt—

Q. (Interrupting.) I mean prior to that time.

A. There was no— My attention was never drawn to the buckets until that time.

Q. Who, if anyone, made any complaint about the tubs prior to that time?

A. Nobody ever made a complaint to me.

Q. Nobody? A. No.

Q. At that time, after McHugh got hurt and you were working there, did you have occasion to notice in what position the tub was in? A. Yes, sir.

Q. What was the position, at that time, of the tub? [282]

A. It was standing with the back toward the coal pile.

Q. About where was the tub?

(Testimony of O. W. Pollow.)

A. Oh, about ten feet under the deck, I should judge; something like that.

Q. How far back had the work progressed underneath the coaming of No. 2 hatch at that time?

A. Oh, I should judge fifteen or eighteen feet.

Q. You got back fifteen or eighteen feet?

A. Yes, sir.

Q. Underneath the coaming? A. Yes, sir.

Q. In which wing was it McHugh was hurt?

A. In the port wing; left-hand side, next to the dock.

Q. Left-hand side next to the dock?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir; because when I looked down there, the other two tubs was being filled and this tub was standing there, and two men were looking at it where the man got hurt.

Q. Was the work being carried on with the other two men at that time?

A. They didn't for a few minutes, but they did after a while.

Q. I mean with the other two tubs?

A. Oh, the other two tubs was working all right.

Q. They were working right along? A. Yes.

Q. But the other men temporarily ceased?

A. They temporarily ceased until we got another man.

Q. Do you know how soon after one o'clock it was that this accident [283] happened?

(Testimony of O. W. Pollow.)

A. Oh, I think it was right near two o'clock when this happened.

Q. Did you make any memorandum at the time in your log-book? A. Yes, sir.

Q. How soon afterwards did you make your memorandum in the log-book?

A. Oh, I got this memorandum at the purser's office.

Q. What time was it according to your log-book?

A. It is here as 2:15.

Q. State how close, as near as you can recollect at this time that was, that accident was to the entry in the log-book. In other words how soon after the accident did you make your entry?

A. Well, I should judge fifteen minutes.

Q. In fifteen minutes? A. Yes.

Q. What became of McHugh that night? Where did he eventually go to, I mean?

A. I phoned up to the doctor and the doctor told us to take him to the hospital, so I called a cab and took him to the hospital.

Q. Did you make your entry before or after he was sent to the hospital?

A. This was just after we got him into the cab.

Q. Did you accompany him to the hospital?

A. No, sir.

Q. And you made the entry immediately afterwards? A. Yes.

Mr. ROBERTSON.—I think that's all at this time.

Whereupon Court adjourned until Wednesday, March 28, 1923, at 10 o'clock A. M. [284]

(Testimony of O. W. Pollow.)

Wednesday, March 28, 1923.

Court met pursuant to adjournment at 10 A. M.

Mr. WICKERSHAM.—We desire the record to show that we give the counsel for the defendant a copy of our instructions, such as we have given to the Court.

Mr. ROBERTSON.—Also that the defendant reciprocates and gives the plaintiff a copy of its instructions.

Testimony of O. W. Pollow, for Defendant (Recalled).

O. W. POLLOW having been recalled on behalf of the defendant herein, was further examined in chief by Mr. Robertson and testified as follows:

Q. Mr. Pollow, did you have any occasion during that night or the early morning of March 9, 1922, to examine this particular coal tub about which you have testified?

A. Yes, about an hour after the accident.

Q. In what condition did you find the tub at that time?

A. Well, the lever on that trip, there was a mechanism up there on the tub where this lever works that was sprung so that the lever could work sideways away from the bucket.

Q. Now, when you say "mechanism," I wish you would explain that as carefully as you can go the jury, just what you mean by the term "mechanism," in that particular respect.

A. Well, it is where the, where the trip—the trip

(Testimony of O. W. Pollow.)

is on a bolt; swings on a bolt back and forth and the hook slips on a lever, goes back and forth and the becket is made fast on a little bolt on the bucket, and when the lever is pulled the other way (indicating) the hook comes off of that block (indicating), and where the hook is pivoted, there is a little frame there and this frame had been sprung so that the lever could swing sideways away from the bucket and [285] back to it and that allowed it to swing so far that it was less than a quarter of an inch that was holding on the block and it was easy to pull it off and I threw the bucket to one side so that they couldn't use it any more.

Q. How long was that after Mr. McHugh was hurt?

A. Well, I don't know exactly. It was about an hour.

Q. About an hour. Now, what, if any, effect or result would follow if a man handling the tub pulled or shoved by pulling on the bail itself—I mean on that particular tub, under those conditions?

A. Under those conditions, you would be apt to pull the hook and pull the bail down.

Q. Mr. Pollow, were you there when the first tub of coal that went up to the hopper was dumped, that you speak of, that was dumped?

A. In the afternoon, when we got in; yes, sir.

Q. How did that occur?

A. Well, when we first got in—the first thing we do, as a rule, when we want to dump into the hopper, we have to line up our booms and our gear so

(Testimony of O. W. Pollow.)

that the tub will, when it's up at the hopper, will hang directly over the hopper, so that when the bucket is tripped, it will dump into this hopper. The hopper is just an open-bottom box, about five feet square and they run their cars under this box and dump the bucket into the box, and it goes right through the box into the car and the car is wheeled into the warehouse and dumped, and in order to get things started right, we have to haul up an empty bucket over the hopper and see that it is aligned there in proper shape and then [286] haul the buckets up, and usually, and especially in this case, it was low tide when we got in and in hauling this bucket up, it took just all we could do to get the boom out over the dock far enough and get it high enough so that it would clear it so that the bucket would go over this hopper and the first bucket that went up, the winchman wasn't used to it yet and didn't get it clear of the hopper and he bumped it pretty hard and the bucket tripped.

It happens very often that the bucket trips that way.

Q. Now, then, Mr. Pollow, during the time that you were on watch, during the unloading of this cargo of coal, did any other bucket besides this one particular bucket spill coal?

A. Not to my knowledge on the dock, but—

Q. (Interrupting.) I mean to say, either on the dock or in the hold?

A. Very often in the hold, but they don't fasten that—

(Testimony of O. W. Pollow.)

Q. (Interrupting.) Well, just answer whether or not they did? A. Yes, sir.

Q. State whether or not it is a frequent or infrequent occurrence for a tub to spill coal?

A. Yes, sir, it is very frequent.

Q. Was this one tub the only tub that spilled any coal back into the hold as you were unloading the ship during that time while you were on shift?

A. Well, I couldn't say which tub was dumped, but they do dump and we don't pay much attention to it, because it is carelessness of the crew in not hooking that safety on. I don't know which tub was dumped.

Q. You don't know which tub was dumped?
[287] A. No, sir; I don't.

Q. Now, Mr. Pollow, yesterday noon, just after the Court took its noon recess, did you have occasion to see the plaintiff McHugh leave the courthouse? A. Yes, sir.

Q. What street did he go down as he left the courthouse?

A. He walked down the steps; went cater-corner across the street; went down the road.

Q. What kind of a road is that?

A. It's a rocky road.

Q. You heard him testify that as he went down the road, he followed the automobile tire track all the way down? A. Yes.

Q. What have you got to say about that?

A. There was another man with him and they both walked across the street, and the other man

(Testimony of O. W. Pollow.)

took the automobile track and he went alongside of him, on the outside.

Q. Was the place where he walked smooth?

A. No, sir, it was all pebbles.

Q. And how far could you see him go?

A. Why, I was standing on the steps here and I could see him till he got down on the bridge.

Q. Till he turned the corner? A. Yes, sir.

Q. And during a part of that time you were watching the man, who was standing by, near you, watching him?

A. Well, you come down the stairs.

Q. Anybody else? [288] A. And Mr. Ziegler.

Q. Anybody else? A. Mr. Wickersham.

Q. While this man was going down the road?

A. Yes, sir.

Q. That is McHugh? A. Yes, sir.

Mr. ROBERTSON.—I desire, if the Court please to have these illustrations, or plats and also the plat on this side (indicating), received in evidence for the purpose of illustration in connection with the witness' testimony.

The COURT.—You desire to offer them as evidence?

Mr. ROBERTSON.—I think so, so that they may go to the jury.

The COURT.—You will have to offer them in evidence and have them marked as exhibits.

Mr. ROBERTSON.—That's what I desire to do.

The COURT.—Any objection, Judge Wickersham?

(Testimony of O. W. Pollow.)

Mr. WICKERSHAM.—I don't like to waive it and I don't want to admit anything.

The COURT.—Well, they may be received.

Mr. WICKERSHAM.—I like to be courteous, but I don't want to waive any of my rights.

Whereupon a blue-print, showing cargo stowage plan of the steamer "Latouche," bearing the date of June, 1920 and file No. 722, and two sheets, containing pencil sketches showing coal bucket in different positions, were received in evidence and marked Defendant's Exhibits Nos. 1, 2, and 3 respectively.

Mr. ROBERTSON.—That's all.

Cross-examination.

(By Mr. WICKERSHAM.)

Q. Mr. Pollow, do you remember the first matter that was called [289] to your attention when you came on the witness-stand?

A. No, sir, I don't believe I do.

Q. Don't you remember that you were asked to look at this illustration made by one of our assistants and to say what was wrong about it?

A. Yes, sir.

Q. Do you remember what you said about it?

A. Yes, sir.

Q. What was the first objection you made to it?

A. Why, I said the trip was on the wrong side of the—

Q. (Interposing.) Of the bucket.

A. Of the bail; not the bucket.

Q. And of the bucket, too?

A. No, sir; I didn't say of the bucket.

(Testimony of O. W. Pollow.)

Q. On the wrong side of the bail was all you said?

A. Yes, sir.

Q. And you have it on the same side of the bucket as this? A. Yes, sir.

Q. Well, now, is it on this side or on the other side of the bucket?

A. It's on the right side of the bucket.

Q. It's on the right side of the bucket. And this is the right side of the bucket (indicating)?

A. Yes, sir.

Q. So there is no mistake about where it ought to be on the side of the bucket?

A. It's on the right side.

Q. Now, you were the mate in charge, you say, from twelve o'clock until four?

A. Yes, sir. [290]

Q. Twice a day? A. Yes, sir.

Q. From twelve o'clock noon to four o'clock in the afternoon and from twelve o'clock midnight to four o'clock in the morning? A. Yes, sir.

Q. So that you were not on watch on the eighth day of March, when this man worked because he began at noon—he began at seven o'clock.

A. I was not there at that time.

Q. You were not there. Do you know whether anybody gave him, or the men, instructions in the management of those buckets at that time?

A. Oh, I couldn't say.

Q. You don't know anything about that, do you?

A. No, sir.

Q. Now, when you came down there at one o'clock,

(Testimony of O. W. Pollow.)

did you give them any instructions? I mean—yes, it was one o'clock, after twelve, when you came on watch? A. Yes, sir.

Q. Now, Mr. Pollow, just tell us what you told them.

A. Well, they were having trouble in getting their buckets in place—

Q. (Interrupting.) Who was?

A. The men below, at different times, different ones.

Q. Yes.

A. And I told them to use the ropes to pull the bucket into place with.

Q. Is that all you told them? [291]

A. Practically. I might have told them other things that I don't remember, but I know I told them about the buckets.

Q. You told them to use these ropes and pull them into place? A. Yes, sir.

Q. You remember that distinctly? A. Yes, sir.

Q. You're positive about that, are you?

A. Yes, sir.

Q. You were down in the hold and told these men that? A. I was down in the hold.

Q. On the ninth day of March at one o'clock in the morning, or thereabouts? A. Yes, sir.

Q. You were down in the hold where they were using the buckets and shoveling into these buckets?

A. Yes, sir.

A. And you instructed these men in the management and use of the buckets? A. Yes, sir.

Q. How long did you stay down there?

(Testimony of O. W. Pollow.)

A. Oh, probably two minutes.

Q. Yes.

A. Three minutes. I was never in one place very long, because I have lots of work to do all over the ship.

Q. Did you see this plaintiff down there at that time? A. Not to know him.

Q. Did you examine that bucket at that time?

A. No, sir; not the first time I went down. [292]

Q. Not the first time? A. No.

Q. When did you examine that bucket?

A. About an hour after this man got hurt.

Q. Then you examined the bucket?

A. I examined the catch then, because they told me then.

Q. They told you then. Had you examined it especially before that time?

A. No, sir, I don't examine specially. Unless there is something wrong with them, it is not necessary.

Q. Mr. Pollow, I wish you would explain how large this catch or hole is through which they worked that coal. Tell how long it was and how wide, in that vessel that night.

A. I can't tell exactly, but it is about thirty feet long.

Q. About thirteen feet long?

A. Thirty feet long.

Q. Oh, about thirty feet long.

A. Yes; and about eighteen feet wide.

Q. About thirty feet long and about eighteen feet wide? A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. Now, assuming that that is the size you mention— A. Yes, sir.

Q. Thirty feet long and about eighteen feet wide, where did these men begin taking out the coal? Where was the coal located with respect to that hatch, thirty feet long and eighteen feet wide?

A. The hatch was completely filled with coal.

Q. Completely filled with coal. A. Yes, sir.

Q. And where did they begin to take it out—at which end? [293] A. On the forward end of the hatch.

Q. On the forward end, over here (pointing)?

A. Yes, sir.

Q. And they worked back?

A. They worked right straight down there.

Q. Right straight down? A. Yes, sir.

Q. Now, at midnight, at one o'clock, at midnight, when you went on, on the night of the eighth and the morning of the ninth, what area of that hatch had they worked out?

A. They had worked about half of the hatch out and they were working forward under the hatch.

Q. They had worked about half of it out?

A. Yes, sir.

Q. Then, at that time this forward end or south end of the hatch was worked out? A. Yes, sir.

Q. And the other end had not yet been touched?

A. No, sir.

Q. And where did you say this plaintiff and his crew of three men were working?

A. Working in the port wing, next to the dock.

(Testimony of O. W. Pollow.)

Q. That is, they were working on this side, next to the dock? A. Yes, sir.

Q. You are sure about that now, are you?

A. Yes, sir.

Q. And where were the other crews working?

A. One was working right amidships.

Q. Right amidships, here (pointing)? [294]

A. Yes, sir.

Q. And the other?

A. The other one was working in the starboard wing.

Q. Over here (pointing)? A. Yes, sir.

Q. How far underneath?

A. Oh, probably at that particular time, there, they was probably fifteen feet, maybe more.

Q. Fifteen feet under the upper deck?

A. Fifteen feet under the upper deck.

Q. Back under here (pointing)? A. Yes, sir.

Q. How far back under the upper deck was the central crew? A. They were practically in line.

Q. They were practically in line?

A. All about the same.

Q. And all of them in line? A. Nearly.

Q. And this crew you think, here (pointing), where you say the plaintiff was working, was the same? A. Yes; oh, yes.

Q. How much coal was there left on the port and starboard sides of that hatch at that time?

A. Oh, I couldn't tell exactly.

Q. Well, I don't care to have it exactly. Assuming that that is the coaming of the hatch above.

A. Yes, sir.

(Testimony of O. W. Pollow.)

Q. How far from that coaming was the coal on the port and starboard sides? [295]

A. Oh, it was clear to the wings on both sides.

Q. Clear to the wings? A. Yes, sir.

Q. In other words, it was worked out on both sides clear to the side of the vessel? A. Yes, sir.

Q. And they had worked up this way, you think, twelve or fifteen feet? A. Yes, sir.

Q. And you are quite sure that this plaintiff and the two men working with him were working on the port side, next to the wharf? A. Yes, sir.

Q. Next to the dock. Where were you when he was hurt? A. I was on the dock.

Q. You was on the dock. You didn't see him hurt, then, of course?

A. I didn't see him get hurt; no, sir.

Q. How soon after that did you see him?

A. Oh, probably two or three minutes.

Q. Did you see any of these buckets brought out from under that hatch and hoisted?

A. Yes, sir; I helped to get them up.

Q. Before he was hurt, I mean.

A. Yes, sir; that is what I mean.

Q. They went to work at one o'clock?

A. Yes, sir.

Q. And he was hurt in about a half an hour after that?

A. Well, probably an hour after that. [296]

Q. Probably an hour after that? A. Yes, sir.

Q. Now, in the meantime had you been down in that hatch? A. Certainly.

(Testimony of O. W. Pollow.)

Q. And you had seen where he was at work, you think?

A. Well, at that time I didn't know where he was until he got hurt.

Q. Well, did you see him down there at any time when you knew who he was? A. No.

Q. You did not.

A. I didn't know who he was until he came out of the hatch.

Q. Now, when you say that he was working on the port or starboard side, how do you know that?

A. Because he came out of the hold hurt and I knew he must have been down there to get hurt.

Q. Oh, he came out of the hold, and he was hurt. But that isn't the question I'm asking you. I'm asking you, how do you know that he was working on the port side?

A. Because when I went down, these two men were waiting for another man to help them with the bucket.

Q. Is that the only way you know?

A. That's the only way I know.

Q. Didn't anybody else tell you anything about it? A. Why, certainly, the men told me.

Q. What did they tell you?

A. They told me that this man got hurt on this bucket.

Q. Did they tell you whether he was working on the port or starboard side? [297]

A. On the port side.

Q. Who told you that? A. Yes, sir.

(Testimony of O. W. Follow.)

Q. You saw these men in court here on the witness-stand? A. Yes, sir.

Q. Which one of them told you that?

A. Oh, I couldn't tell you now, because I didn't pay any attention to the men, or which one—

Q. Are you sure it was either one of them?

A. Oh, I couldn't tell who they were. It was the two men that were on the bucket.

Q. These men down there, you say you think they told you he was working on the port side?

A. I know they told me.

Q. Where were you when they told you that?

A. I was down in this, down by the bucket.

Q. But that was after he had gone out?

A. Yes, sir.

Q. Then somebody told you that he was working on the port side.

A. The men that were working on that bucket told me.

Q. They told you? A. Yes, sir.

Q. Was it this native man that told you?

A. I couldn't tell whether it was or not. I wouldn't know one man from the other.

Q. Now, you examined this bucket, you say?

A. Yes, sir.

Q. How soon after he was hurt? [298]

A. About an hour.

Q. You went down there about an hour afterward and these two men were standing by the bucket, on the port side? A. No, sir.

Q. Well, just tell the jury exactly what you did say about that.

(Testimony of O. W. Pollow.)

A. Well, that time I got another man. I called up Pauze, the man on the dock that hires the men and told him a man got hurt and we wanted another man, so he sent another man down, and they went to work again.

Q. Yes.

A. And then about an hour after that the bucket fell again and I was standing right in the hold; I was standing in the hold when the bail fell down on a man's foot again; but I saw the man pulling on the bail—

Mr. WICKERSHAM.—I didn't ask you that. Read the question.

Mr. ROBERTSON.—I think that he ought to be permitted to answer.

The WITNESS.—I'm trying to tell what I done.

The COURT.—Just answer the question that you are asked.

The WITNESS.—I beg your pardon, your Honor; he asked me—

The COURT. (Interrupting.) Never mind. Just answer the question.

(Question repeated by reporter at request of Court.)

Mr. ROBERTSON.—What did Mr. Pollow say, you mean?

(Preceding question repeated by reporter at request of Court.)

Q. Just tell the jury what you did do, what you did say to these men when you went down there.

The COURT.—If you know.

Q. If you know. [299]

(Testimony of O. W. Pollow.)

A. I don't remember the exact words, what I said, but I told them to go ahead; I would get them another man.

Q. Yes. Did you examine the bucket then?

A. No, sir.

Q. Now at that time Barney had been hurt and had gone out? A. Yes, sir.

Q. When did you examine the bucket?

A. About an hour later.

Q. About an hour later. You say there was another man hurt in the meantime? A. Yes, sir.

Q. Now, after that you did examine the bucket?

A. Yes, sir.

Q. And what did you cause to be done with the bucket? A. I caused it to be put aside.

Q. Caused it to be put aside? A. Yes, sir.

Q. Now, when you examined that bucket, I wish you would just tell this jury now whether there were any ropes on it for the purpose of pulling the bucket with?

A. Yes, sir; there were ropes—one on each forward corner.

Q. And you think there were handholds there for the purpose of pulling the bucket?

A. I'm positive. They don't make them without.

Q. They don't make them without. And you are just as positive that the ropes were there?

A. Yes, sir.

Q. And the only thing that was the matter with the bucket was that the jigger, or the trigger was out of order, as you have described? [300]

A. The mechanism was—

(Testimony of O. W. Pollow.)

Q. (Interrupting.) As you have described?

A. Sprung; yes.

Q. Now, when did you give these instructions about the management of this bucket to these men, after twelve o'clock?

A. Oh, directly after twelve.

Q. Directly after twelve?

A. Or after one, rather.

Q. After one. You remember that very clearly, do you? A. Yes, sir.

Mr. WICKERSHAM.—I think that's all.

Redirect Examination.

(By Mr. ROBERTSON.)

Q. Who was Pauzi, that you called up?

A. Well, he's—he acts as longshore boss.

Q. Now, how did these other men get hurt that Judge Wickersham asked you about?

A. Well, they did the same thing.

Mr. WICKERSHAM.—I didn't ask him about that and I object to counsel going into that, if the Court please.

Mr. ROBERTSON.—Now, if the Court please, I'll ask Mr. Folta to read the question and answer.

Mr. WICKERSHAM.—Well, I'll withdraw my objection. Go ahead.

Q. Now, how did these other men get hurt, Mr. Pollow?

A. They were doing just what I had told them not to do—pulling on the bail, pulling backwards against the pile.

Q. Where were you?

(Testimony of O. W. Pollow.)

A. I was standing right on the coal pile, right in the opening of the hatch. [301]

Q. Now, then, how soon after McHugh came up out of the hold and you found out he was injured, did you say that you went down into the hold?

A. Probably fifteen minutes.

Q. What, if anything, what were the men doing at that time who had been working with him?

A. They were standing, waiting for another man. They didn't want to work until they got another man.

Q. Where were the other two buckets?

A. They were working.

Q. Whereabouts were they working?

A. One on the starboard side and one amidships.

Q. Which side was it that there was no bucket working on?

A. The port side.

Q. When a bucket is working with its crew of men, does it continue in one particular part of the ship, or does it go to a new part of the ship and work?

A. No, sir; they all have their place to work in. When their bucket is hauled up, they wait for it to come back; always work the same place with the same bucket.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

Testimony of H. C. Story, for Defendant.

H. C. STORY, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. State your name? A. Henry C. Story.

Q. What is your profession? [302]

A. Well, a physician.

Q. Where do you live? A. Ketchikan, Alaska.

Q. How long have you been a physician?

A. About 27 years.

Q. From what school did you graduate?

A. Jefferson School of Medicine, 1894.

Q. Have you been practicing your profession since? A. Yes, sir.

Q. I will ask you if you were practicing your profession at Ketchikan during the month of March, 1922? A. Yes, sir.

Q. Did you have occasion to treat Barney McHugh? A. Yes, sir.

Q. Will you state to the jury how you happened to treat him?

A. How I happened to treat him?

Q. Yes; how you came to treat him.

A. I was called in to treat him. He was taken over to the hospital. I made an examination. I thought he had a fracture—

Q. (Interrupting.) Just a moment. What time

(Testimony of H. C. Story.)

was it you came to him or that you called in to see him, if you recall?

A. I was called to see him. I guess it was some time in March, early part of March.

Q. What time of the day or night?

A. I don't just exactly recollect.

Q. You don't recall the exact time?

A. No, sir.

Q. When you came to him did you have a report of what had happened [303] to him, or did he tell you?

A. No; I made an examination—

Q. (Interrupting.) You made an examination of what? A. Of his foot.

Q. Of his foot.

A. And advised him to go over to Doctor Ellis' and have an X-ray taken, which he did.

Q. Did he do that? A. He did.

Q. I will ask you if you recognize that picture (handing picture to witness).

Mr. WICKERSHAM.—I would like to ask the witness a question, may it please the Court—if he was present when the picture was made?

A. No.

Mr. WICKERSHAM.—Well, then, I object to it, may it please the Court.

Mr. ZIEGLER.—I can follow that up.

The COURT.—Well, you haven't shown that he knows that this was the picture of the foot.

Mr. ZIEGLER.—Not yet.

(Testimony of H. C. Story.)

Q. You say that you had him go over to Doctor Ellis' ? A. Uh-huh.

Q. To have a picture taken of his foot?

A. Yes, sir.

Q. Did he do that? A. Yes, sir.

Q. Did you get the picture of his foot?

A. Yes, sir. [304]

Q. I will ask you to state whether or not the photograph you have is a photograph of his foot?

A. That's correct. It's a fracture of the metatarsal bone—

Mr. WICKERSHAM.—Now, wait a moment.

Q. Is that the photograph of his foot as given to you by the man who gave you the photograph?

A. I think so.

Mr. WICKERSHAM.—I object, if that is all the evidence he can give.

Q. Can you explain to the Court now, Doctor, just how that picture was taken?

Mr. WICKERSHAM.—Well, I object to that.

The COURT.—Yes.

Mr. WICKERSHAM.—He wasn't present when it was taken.

The COURT.—If he knows— Do you know how it was taken?

The WITNESS.—Well, your Honor—

The COURT. (Interrupting.) Answer. Do you know how it was taken?

The WITNESS.—I have an idea how it was taken.

The COURT.—Well, do you know?

(Testimony of H. C. Story.)

The WITNESS.—I wasn't there; of course not.

Mr. WICKERSHAM.—Well, then, I object to it, may it please the Court.

Q. All right. Did you have a picture taken, or order a picture taken of your patient's foot at the time? A. I did.

Q. Did you receive the picture? A. I did.

Q. Whom did you receive the picture from?
[305]

A. The picture was put under a glass case, electric light, and shown to me, and I examined it through this light, as they always do an X-ray—

Mr. WICKERSHAM. (Interrupting.) Now, may it please the Court, I object to that. We're talking about the picture now.

Mr. ZIEGLER.—That is preliminary.

The WITNESS.—This picture.

Q. Now, Doctor, you examined the picture after it was taken?

A. Certainly; to find out, to ascertain where the fracture was.

Q. Now, I will ask you to state whether or not the picture that you have in your hand is the one you examined at the time?

A. I'm quite sure that it is, because it's the same kind of a fracture.

Mr. WICKERSHAM.—Now, I renew my objection, may it please the Court, because he hasn't connected himself with the making of the picture. He doesn't know who made it.

Mr. ZIEGLER.—Yes, he does.

The COURT.—Wait till he gets through.

Mr. WICKERSHAM.—He testified that he didn't. He wasn't there. He has merely said something about somebody who told him something about it. We object to it as hearsay.

The COURT.—Objection sustained.

Mr. ZIEGLER.—Well, Doctor Story doesn't have an X-ray machine and he doesn't take X-ray pictures, and, of course, he could not take the X-ray picture himself, but he has testified that he ordered the picture taken and that after it was taken, he looked at it under a glass and located the fracture, and that this is the picture that was taken and that it was exhibited to him by the man who took it. [306]

The COURT.—He says he doesn't know that that is the picture that was taken of the man's foot.

Mr. ZIEGLER.—Well, then, I'll ask him.

The COURT.—Wait a moment. The testimony doesn't show that he knows it was the picture taken of the man's foot. You are assuming something in this matter that you haven't connected up with the evidence.

Mr. ZIEGLER.—All right.

The COURT.—You are assuming that Doctor Story knows that this is the picture that was taken of the plaintiff's foot. He may have examined a picture which somebody else may have shown to him and taken it for a picture of the man's foot. But you are trying to prove that this

(Testimony of H. C. Story.)

is a picture of the man's foot and you have not connected it with the man's foot.

Q. Doctor, you had the picture taken, I think, you testified, under your direction?

A. Yes, sir.

Q. What was the purpose of having the picture taken?

Mr. WICKERSHAM.—We object to that.

The COURT.—Objection sustained. You have gone all over that before.

Mr. WICKERSHAM.—The only way they can prove that is by bringing the photographer here who took the picture. Counsel knows that.

Q. I will ask you, Doctor, whether or not you know that the picture that you have is the picture—

Mr. WICKERSHAM.—I object to that.

Mr. ZIEGLER.—I haven't finished, Judge.

Mr. WICKERSHAM.—Go ahead. [307]

Q. Doctor, I will ask you if you know that that is a picture of the plaintiff's foot, Barney McHugh's foot, at the time he entered the hospital?

Mr. WICKERSHAM.—I object now to that, because there is no basis for the doctor's answering that question except upon hearsay.

Mr. ZIEGLER.—Well, that's the question.

The COURT.—The Doctor can answer if he knows.

Mr. WICKERSHAM.—Let him say if he knows it then.

A. I don't know. There is only one way to answer that. An X-ray picture—

(Testimony of H. C. Story.)

The COURT. (Interrupting.) Answer that yes or not. Do you know that that is a picture of Barney McHugh's foot?

A. I have reason—

Mr. WICKERSHAM. (Interrupting.) Well, now, I object to that. He can answer yes or no.

A. Well, how can I answer that question? I wasn't there when the picture was taken.

Mr. WICKERSHAM.—I don't think you can.

The COURT.—You can answer it yes or no.

Q. Answer it yes or no.

A. Then, I'll say no; I can't say.

Q. You can't say whether that is the picture?

A. No.

Q. All right. Doctor, you state that you had a picture taken at that time?

Mr. WICKERSHAM.—No, he didn't; and I object to counsel's putting that into his mouth.

The COURT.—Objection sustained. [308]

Q. All right. You made an examination of his foot? A. Yes.

Q. Tell the jury what you discovered was wrong with his foot at that time?

A. I suspected a fracture.

Q. And did he have a fracture? A. He did.

Q. Just describe that fracture to the jury?

A. He had a fracture of the second metatarsal bone of the left foot.

Q. Of the left foot? A. Yes, sir.

Q. Now, after you ascertained that fact, just tell the jury the treatment that you gave the patient.

(Testimony of H. C. Story.)

is a picture of the man's foot and you have not connected it with the man's foot.

Q. Doctor, you had the picture taken, I think, you testified, under your direction?

A. Yes, sir.

Q. What was the purpose of having the picture taken?

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The COURT.—Objection sustained. You have gone all over that before.

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Q. I will ask you, Doctor, whether or not you know that the picture that you have is the picture—

Mr. WICKERSHAM.—I object to that.

Mr. ZIEGLER.—I haven't finished, Judge.

Mr. WICKERSHAM.—Go ahead. [307]

Q. Doctor, I will ask you if you know that that is a picture of the plaintiff's foot, Barney McHugh's foot, at the time he entered the hospital?

Mr. WICKERSHAM.—I object now to that, because there is no basis for the doctor's answering that question except upon hearsay.

Mr. ZIEGLER.—Well, that's the question.

The COURT.—The Doctor can answer if he knows.

Mr. WICKERSHAM.—Let him say if he knows it then.

A. I don't know. There is only one way to answer that. An X-ray picture—

(Testimony of H. C. Story.)

The COURT. (Interrupting.) Answer that yes or not. Do you know that that is a picture of Barney McHugh's foot?

A. I have reason—

Mr. WICKERSHAM. (Interrupting.) Well, now, I object to that. He can answer yes or no.

A. Well, how can I answer that question? I wasn't there when the picture was taken.

Mr. WICKERSHAM.—I don't think you can.

The COURT.—You can answer it yes or no.

Q. Answer it yes or no.

A. Then, I'll say no; I can't say.

Q. You can't say whether that is the picture?

A. No.

Q. All right. Doctor, you state that you had a picture taken at that time?

Mr. WICKERSHAM.—No, he didn't; and I object to counsel's putting that into his mouth.

The COURT.—Objection sustained. [308]

Q. All right. You made an examination of his foot? A. Yes.

Q. Tell the jury what you discovered was wrong with his foot at that time?

A. I suspected a fracture.

Q. And did he have a fracture? A. He did.

Q. Just describe that fracture to the jury?

A. He had a fracture of the second metatarsal bone of the left foot.

Q. Of the left foot? A. Yes, sir.

Q. Now, after you ascertained that fact, just tell the jury the treatment that you gave the patient.

(Testimony of H. C. Story.)

A. I gave the treatment that is usually performed in cases of that kind—waited until the swelling subsided and let him immobilize the foot.

Q. You waited until the swelling subsided in the injured foot? A. Yes.

Q. Then you immobilized the foot or the fracture? A. Yes, sir.

Q. Explain that to the jury.

A. Immobilized it by putting it in a cast.

Q. What kind of a cast? A. Plaster case.

Q. Is that the usual method of treating a broken—

A. (Interrupting.) Yes, sir, it would be.

Q. (Continuing.) A broken bone?

A. Well, that depends altogether— On a bone like that, it would be; yes. [309]

Q. How long did that cast remain on the patient's foot?

A. Well, that accident happened some time during the first part of March, and he was discharged the 24th of April.

Q. Now, I will ask you, Doctor, if you knew the condition of his foot when he was discharged?

A. Yes, sir.

Q. Tell the jury what the condition was?

A. It was repaired.

Q. And by "repaired" what do you mean?

A. I mean it recovered from the fracture.

Q. State whether or not the bone that had been fractured had healed at that time?

A. It had.

(Testimony of H. C. Story.)

Q. How do you know that?

A. Well, you may not allow me to answer.

Q. Well, if it is not a proper answer, the Court will strike it out of the record and instruct the jury not to pay any attention to it, so you answer the question.

A. I had an X-ray taken of it.

Q. What did that reveal?

Mr. WICKERSHAM.—Well, now, may it please the Court. Is this the same X-ray that you have been talking about all the time, Doctor?

The WITNESS.—Not exactly the same one. The first one is of the fracture. The second one is of the recovery of the fracture.

Mr. WICKERSHAM.—Did you take the second one?

The WITNESS.—No, sir.

Mr. WICKERSHAM.—Were you present when it was taken?

The WITNESS.—No, sir. [310]

Mr. WICKERSHAM.—Well, now I renew my objection to any testimony with respect to that upon the same ground—mere hearsay.

Mr. ZIEGLER.—If the Court please, I think a physician should be permitted to answer as to a condition of that kind, as to the condition of a patient when he was discharged and as to how he arrived at that condition. Now, the Court realizes that not all physicians have X-ray machines and that they cannot be present when these pictures are taken and they have to take the word

of the man who took the picture of the foot to the effect that it is the same foot or broken member that was X-rayed. There is no way that he can tell other than to take his word for it. It's a good deal the same as the proposition as to who our fathers and mothers are. We have to take somebody's word for it. We have to take their word for it. It's hearsay, but we know it's true, just the same.

The COURT.—Well, he has already stated that it was healed and he stated how he knew it. He stated that he had an X-ray taken and that is how he knew. That is as far as the testimony has gone.

(Question repeated at request of Court by reporter.)

Mr. WICKERSHAM.—Now, we object to that, may it please the Court. I have asked him some preliminary questions to show that he wasn't present and that it is hearsay and he can't testify. Counsel can go and get this man that took the picture. It was taken, I assume, here in town.

Mr. ZIEGLER.—Well, if the Court please, I will tell Judge Wickersham and the Court that we have subpoenaed Doctor Ellis and sent a boat for him to the west coast of Prince [311] of Wales Island —

Mr. WICKERSHAM.—Well, I object to counsel's making this statement to the jury.

Mr. ZIEGLER.—Well, that is a fact.

The COURT.—Well, the jury will disregard all

(Testimony of H. C. Story.)

these arguments. He may state. Objection overruled. He may state what this X-ray picture revealed to him, but you can't offer any X-ray picture in evidence.

Q. What was the result, Doctor, of the pictures—what did the picture show that you had taken of the injured member?

A. Showed it healed; the fracture had been healed.

Q. State whether or not that was easily apparent or diff—

Mr. WICKERSHAM. (Interrupting.) Well, now, we object to that, may it please the Court.

The COURT.—The picture is the best evidence of that.

Q. All right. Now, Doctor, did you also make a personal examination at that time of the foot?

A. Oh, sure.

Q. What was the result of that examination?

A. Why, it showed that it was healed.

Q. Yes.

A. Recovery from the fracture.

Q. Now, after this personal examination and the X-ray picture, what did you do with reference to the patient?

A. Discharged him.

Q. And why did you discharge him?

A. Because he recovered. There was no necessity for any further hospital treatment.

Q. I will ask you if at that time there was any-

(Testimony of H. C. Story.)

thing wrong with [312] the first metatarsal bone of the foot?

A. No, sir; except that naturally there would be a little stiffness until he had exercised it. Outside of that there was nothing the matter with it.

Q. Now, just explain to the jury fully the condition of the patient when he was discharged from the hospital, with reference to the fracture and prior injured member.

A. Well, the fracture showed that it had healed and when he was discharged, he didn't require any foot treatment. He might possibly have a little stiffness in that foot which you would get from all fractures, but outside of that, he didn't require any physician's treatment.

Q. Now, with reference to that stiffness, was that usual or unusual in a broken bone of that kind?

A. That is usual.

Q. What would that stiffness be due to, if anything?

A. Well, from the fracture and the immobilization of the injured foot.

Q. Would the nonuse of the foot have anything to do with it?

A. Yes, sir; that would make a difference, too.

Q. How would that stiffness be removed in any normal case?

A. By proper exercise and judiciously using the foot carefully, you know, that would gradually wear off.

(Testimony of H. C. Story.)

Q. I will ask you if that was a normal case all the way through, Doctor?

Mr. WICKERSHAM.—Well, now— Well, go ahead. A. Huh?

Q. Was this a normal case? A. Yes. [313]

Q. In such a case as that, what, in your opinion, would be required, or what time would have been required for the patient to feel completely well?

A. Four or five weeks.

Q. Four or five weeks? A. Uh-huh.

Q. Now, Doctor, the patient never returned to you after he was discharged from the hospital?

A. No, sir.

Q. Assuming that he now complains of a soreness of the first metatarsal bone—

A. (Interrupting.) On the first metatarsal bone?

Q. First metatarsal bone.

A. I never doctored that.

Q. Well, now, assuming that he now complains of that, what, in your opinion, if anything, could have caused that condition to exist at the present time?

A. I have no idea. I had nothing to do with that. There was no occasion for any first metatarsal bone being injured at the time I treated him. I only treated him for the second metatarsal bone.

Q. Yes.

A. The record shows. If there was any injury to the first metatarsal bone, I have no recollection of that.

Q. I will ask you if there was a soreness there

(Testimony of H. C. Story.)

now, a swelling, as to whether or not, in your opinion that would be due to the original injury—

Mr. WICKERSHAM. (Interrupting.) Well—

Q. (Continuing.) Or something that occurred after his discharge by you?

Mr. WICKERSHAM.—I object to that because it is leading and [314] suggestive and because the doctor has already answered that he didn't know anything about it.

The COURT.—Objection overruled. He may answer.

A. What is your question?

(Question repeated by reporter at request of witness.)

Q. (Adding to question.) That is, on the first metatarsal bone? A. I don't think so.

Q. You don't think it is what? Do you understand the question, Doctor?

A. Yes, I understand the question. You wanted me to testify in regard to the first metatarsal bone?

Q. Yes.

A. Well, I never discovered any injury there. At the time that I had him under treatment, at the time I discharged him, I found no injury there.

Q And if it existed at the present time what, in your opinion, would it be due to; that is, with reference to whether it was due to the first injury, the original injury or something that occurred after his discharge from the hospital?

Mr. WICKERSHAM.—We renew our objection

(Testimony of H. C. Story.)

that it is leading and suggestive. That has already been answered once or twice.

The COURT.—Objection overruled. He can answer as to what his opinion is.

A. Well, I don't like to answer that question very well. It is a possibility, of course, that I might have overlooked a condition there in the first metatarsal bone that afterwards existed. It is possible. I don't claim to be infallible. There is a possibility of it, but so far as my judgment is concerned, I couldn't find any injury at the time I examined [315] him and at the time I discharged him.

Q. Well, if that condition existed at the present time, would you have an opinion as to what caused it to exist now?

A. Yes. What is your question as to that again?

Q. If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?

The COURT.—That is a different question, entirely different question. Do you object?

Mr. WICKERSHAM.—I object; yes.

The COURT.—Objection sustained.

Q. Well, Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?

Mr. WICKERSHAM.—I repeat my objection.

(Testimony of H. C. Story.)

That is leading and suggestive and it has been answered two or three times. The doctor says he can't answer.

The COURT.—Objection sustained.

Q. Doctor, state whether or not, in your opinion, there was any injury to the first metatarsal bone at the time of his discharge from the hospital?

A. None that I discovered.

Q. Could that have been discovered if he had complained of it? A. Yes, sir.

Q. Did he complain of it? A. No, sir.

Q. Doctor, your services were paid for, for treating the patient? A. Yes, sir.

Q. By whom? [316]

A. The Alaska Steamship Company.

Mr. ZIEGLER.—If the Court please, I would like to have the first photograph that I offered, marked for identification, because I intend, when the witnesses get here, if they do arrive, before the case is concluded, to introduce it in evidence.

The COURT.—You may have it marked for identification.

Mr. ZIEGLER.—And I would like to make the offer of that photograph in evidence on the testimony already produced, with regard to this identification, by Doctor Story. Of course, the Court has ruled that it has not been properly identified, but I want to make the offer.

Mr. WICKERSHAM.—And we renew our objection because it has not been properly identified.

Mr. ZIEGLER.—And I also desire to offer in

(Testimony of H. C. Story.)

evidence a photograph which has been testified to here by Doctor Story. First I will ask Doctor Story a question.

Q. I will ask you if you had a photograph taken when the patient was discharged from the hospital?

A. Yes.

Q. Was that taken under the same circumstances as you have related with reference to the first photograph? A. Yes, sir.

Q. And do you know what that photograph is?

Mr. WICKERSHAM.—We object to the introduction or to any consideration of it for the same reason that we have objected to the other. The doctor wasn't present.

Mr. ZIEGLER.—I simply asked him the question if he knows what that photograph is.

The COURT.—Yes, he may answer. [317]

A. Why, yes; that is the—

Mr. WICKERSHAM. (Interrupting.) Well, that's the answer.

The COURT.—He said yes or no. Do you know what that photograph is?

The WITNESS.—Yes, sir.

Q. What is that photograph?

A. That is a photograph of the recovery of a fracture of the second, first metatarsal bone, second metatarsal bone.

Q. Of whose foot is it, if you know?

Mr. WICKERSHAM.—I object to that, may it please the Court, because he wasn't present and doesn't know anything about it.

(Testimony of H. C. Story.)

The COURT.—Well, he may answer.

A. Well, I can't state positively.

Q. You can't state positively? A. No.

Mr. ZIEGLER.—We would like to have the photograph marked for identification, if the Court please.

The COURT.—It may be marked for identification.

Mr. ZIEGLER.—We offer it in evidence, the same as the original photograph.

The COURT.—You object?

Mr. WICKERSHAM.—Yes.

The COURT.—Objection sustained.

Mr. ZIEGLER.—That's all.

Cross-examination.

(By Mr. WICKERSHAM.)

Q. Doctor Story, assuming that this plaintiff was injured at about, between one and two o'clock on the morning of March ninth, 1922, when were you called to see him first? [318]

A. Immediately afterwards, after the injury.

Q. That night?

A. No; I don't remember whether it was in the night-time. No; I think it was in the daytime, unless I am very much mistaken.

Q. Do you know what date it was?

A. It was on the eighth of March, so the hospital records have it. He entered the hospital on the eighth of March.

Q. And when did you call upon him?

A. Right away.

(Testimony of H. C. Story.)

Q. Do you remember whether it was that day or the next day?

A. The same day; the eighth of march.

Q. That is, the day following the night when he was hurt, whether it was the eighth or ninth?

A. I don't know when he was hurt. I thought he was hurt on the eighth. I presume that he was hurt on the eighth and sent up to the hospital and I treated him there.

Q. Well, you didn't call till the next day when the sun was shining?

A. I called on the eighth, whatever—I don't know what time he was injured. I don't know when he was brought there.

Q. You didn't call on him before he was injured?

A. Well, I know I didn't.

Q. Well, now, I said, assuming that he was injured between one and two o'clock on the morning of the ninth—

A. (Interrupting.) Judge, he wasn't injured on the ninth. He was injured on the eighth.

Q. Oh, he was?

A. Yes, he was injured on the eighth of March.

Q. You called on him in the daytime? [319]

A. Yes, sir.

Q. You didn't call on him that night?

A. No, sir.

Q. Now, how long did you care for him, Doctor?

A. I cared for him from the eighth of March until the 24th of April.

Q. Till the 24th of April? A. Yes, sir.

(Testimony of H. C. Story.)

Q. And he was discharged on the 24th of April?

A. Yes, sir.

Q. Now, was it the 24th or 22d?

A. 24th of April.

Q. You are quite sure about that?

A. Why, yes. It depends on my memory. I asked the records of the hospital.

Q. And he was discharged on the 24th?

A. Yes.

Q. You have never seen him since?

A. No, I don't think so.

Q. You say that the second metatarsal bone in his left foot was broken? A. Yes, sir.

Q. Wasn't it the second and third? A. What?

Q. Wasn't it the second and third?

A. The third, yes.

Q. Yes; the second and third. Now, when he was discharged on the 24th of April, Doctor, what shape was his foot in? A. Very good shape.

Q. Well, it was swollen? [320] A. No.

Q. Wasn't it swollen at all?

A. No; not particularly; no, it wasn't swollen.

Q. Was it black and blue? A. No.

Q. It wasn't? A. No.

Q. Nor was it swollen? A. No, sir.

Q. And you didn't discover anything the matter with the first metatarsal bone?

A. With what? No.

Q. I say, you didn't discover anything the matter with the first metatarsal bone?

(Testimony of H. C. Story.)

A. No; no; no; the first I heard it had been injured.

Q. This is the first you heard about it?

A. Yes, sir.

Q. You never gave him any attention for the first metatarsal bone of any kind? A. No, sir.

Q. What sort of examination did you make of the bones, Doctor? A. Usual examination.

Q. By feeling of them? A. Yes, sir.

Q. From that you judged that the first metatarsal bone was broken?

A. Well, Judge, I never depend on my diagnosis alone.

Q. You depend on other things?

A. When we have an X-ray, we depend on the X-ray. The X-ray demonstrates what kind of fracture it is and I depend on that. [321]

Q. And that first bone was not broken according to that? A. The first metatarsal bone?

Q. Yes. A. No, sir.

Q. Now, when you sent him out of the hospital on the 24th of April, you thought he was cured?

A. Yes, sir.

Q. Did he limp any when he went away?

A. Why, his foot was stiff yet, you know, naturally.

Q. Naturally he limped?

A. Oh, a little bit; yes, sure; always do that.

Q. How often did you call to see him when he was in the hospital here? A. Every day.

(Testimony of H. C. Story.)

Q. How long was he there before you put the cast on his foot?

A. Well, that is hard to say, because in the first place, I never put a cast on until the swelling has subsided sufficiently. It is not good surgery.

Q. You did not put that one on for about eight or ten days? A. Very likely.

Q. Yes. A. Yes.

Q. How long did it remain on? A. Which?

Q. The cast?

A. Well, assuming that I didn't put it on for eight days, that would be the 16th, and he was discharged on the 24th of April; so the case was on that length of time.

Q. You took the cast off on the 24th of April?

A. After an X-ray was taken. [322]

Q. You took the cast off before the X-ray was taken. A. I don't think so.

Q. Didn't you?

A. No, I think I had it taken afterwards.

Q. And he was immediately discharged?

A. Yes.

Q. What do you do when you discharge a patient from the hospital here? A. Beg your pardon.

Q. What do you do when you discharge a patient? Have you any formal method of discharging patients from the hospital here? A. No.

Q. Just tell him to go; he's finished? A. Yes.

Mr. WICKERSHAM.—That's all.

(Testimony of H. C. Story.)

Redirect Examination.

(By Mr. ZIEGLER.)

Mr. ZIEGLER.—If the Court please, the question that I desire to ask is perhaps more properly direct than it is redirect, and I ask the permission of the Court to ask it. I omitted to ask Doctor Story a question.

The COURT.—You may ask it.

Q. Doctor, assuming that Mr. McHugh's foot, where it was fractured, is by measurement all the way around his foot, approximately one-half an inch larger than the right foot, I will ask you to state whether or not that condition is usual or unusual where there has been a fracture?

A. A half an inch?

Q. Yes. [323]

A. With a small fracture like that?

Q. Yes.

A. Well, that is rather large, but it might possibly be.

Q. I will ask you if, where a bone is fractured in any of the limbs or the foot, whether or not after the healing has been finished, it is larger than it was before the injury? A. Yes.

Q. That is the usual condition for it to be larger?

A. Yes.

Q. And it varies in different fractures?

A. Yes; you take the foot for instance, or the leg, a fracture you know, there, you would have a shortening of the foot.

Q. And by measuring around the fracture, around

(Testimony of H. C. Story.)

the leg or the limb, would it be larger than it was normally or not? A. Yes; it would be larger.

Q. Would that same condition obtain in any other fracture? A. Yes, sir.

Q. Doctor, you saw Mr. McHugh in court here yesterday when Doctor Mustard was testifying?

A. Yes; I saw him.

Q. That so far as you know, is the only time you have seen him?

A. Well, I may have seen him, but he never came up—

Q. (Interrupting.) Well, you mean by that statement that he has never been to you for treatment?

A. No; I never treated him.

Q. You don't recall whether you saw him or not?

A. No.

Q. At the present time that's all.

Mr. WICKERSHAM.—That's all. [324]

Mr. ROBERTSON.—Under a stipulation or agreement made with counsel, we now offer to read certain parts of an affidavit.

The COURT.—Any objection?

Mr. WICKERSHAM.—No; I have no objection to the jury being excused, but I think I will have an objection to the testimony.

The COURT.—The jury may retire for a few minutes.

(Whereupon the jury retired.)

The COURT.—I understand that it is a part of the affidavit of Mr. Zeigler.

Mr. WICKERSHAM.—I just make the general

objection, may it please the Court, that it is incompetent, irrelevant and immaterial.

Mr. ROBERTSON.—I would also like to read at the same time the stipulation.

Mr. WICKERSHAM.—Well, I object to reading that.

Mr. ROBERTSON.—Then I ask the Court to instruct the jury that it is under the stipulation, just so the jury will realize that it is being put in as evidence.

The COURT.—I'll instruct the jury right now.

(Jury returns to box.)

Mr. ROBERTSON.—I now make an offer to read, if the Court please, from the affidavit of A. H. Zeigler, certain testimony that we contend the witness Alice McNutt would give if personally present, pursuant and under the stipulation which I will file in the case.

Mr. WICKERSHAM.—To that we make the objection which I have made already—that it is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. [325]

The COURT.—Gentlemen of the Jury: Counsel is about to read to you the statement contained in the affidavit for a continuance made last fall by Mr. Zeigler, as to what one, Alice McNutt, would testify to, to get a continuance of the case. Under the law, if the opposing counsel admits that an absent witness will testify to certain facts set forth in the affidavit, a continuance will not be granted on that ground alone. So, under that stipulation, Judge Wickersham, as counsel for defendant, ad-

mits that if Alice McNutt were present and testifying from the witness-stand, she would testify as set forth in the affidavit of Mr. Zeigler, which counsel is about to read to you.

Mr. ZEIGLER.—If the Court will pardon me, I think it should be stated that this witness has been subpoenaed for this trial, but in order not to have a continuance of this trial, Judge Wickersham stipulated that if she were here, she would testify so.

The COURT.—The said witness has been subpoenaed, but in order not to have a continuance of the trial, the stipulation was made that this affidavit may be read as the testimony of Alice McNutt which she would give if she were present.

Mr. ROBERTSON.—The part referred to is as follows: "That the witness, Alice McNutt, if present in court, would testify that she had been residing in Ketchikan, Alaska, since April 1, 1922; that during said time she knew the plaintiff, Bernard McHugh; that he lived in a cabin near her; that she often saw McHugh therein, as well as in her own house; that while he was around his house and in her own house, he never limped on the foot that he claimed has been permanently [326] injured; that he actually told her that he had to limp on it when he went down town, as he was going to get a piece of change from the company, meaning the defendant corporation; that it was difficult to always keep limping when walking about town, because he stated, 'My foot is just as good as any one's.'

"That on or about May 16, 1922, he was preparing to go to some camp to work, but changed his

mind and told her that he was able to work, but that he was going to get wages from the company all summer, and that he could also sell intoxicating liquor on the side, because he could keep up the limping, and the Chief of Police and the authorities would pity him and he could get by in that way."

The COURT.—Gentlemen of the Jury, I want to further instruct you that Judge Wickersham admits that if the witness were present, she would testify to that effect, but he does not admit that the statements made are true, but simply that she would so testify if she were present.

Testimony of Mons Halsor, for Defendant.

MONS HALSOR, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ZEIGLER.)

Q. You may state your name?

A. My name is Mons Halsor.

Q. Where do you live? A. Ketchikan.

Q. Have you been subpoenaed as a witness in this case, Mr. Halsor? [327] A. Yes.

Q. Where were you served with a subpoena?

A. At the Rush & Brown mine.

Q. What were you doing there?

A. I was working on the mine, outside of the mine there.

Q. What is your business; what kind of business do you follow? A. General work of any kind.

(Testimony of Mons Halsor.)

Q. General work. Laboring work? A. Yes.

Q. I will ask you if you have ever been know in Ketchikan by the name of Ole?

A. Well, I always go by that.

Q. You always go by that name? A. Yes, sir.

Q. In Ketchikan? A. Yes, sir.

Q. Were you living in Ketchikan during 1921, or any portion of that year? A. Yes.

Q. 1922?

A. That's last year. 19— well, I have been probably half of the time out at the Rush & Brown mine.

Q. Were you in Ketchikan the month of June?

A. Yes.

Q. 1922? A. Yes.

Q. Did you know Barney McHugh at that time?

A. Yes, sir.

Q. Where have you seen him before? [328]

A. I worked together with him at the Rush & Brown mine, 1921, before Christmas.

Q. You worked with him. Did you see Mr. McHugh in Ketchikan during that time in the month of June? A. Yes, sir.

Q. Did you see him before that time?

A. Yes, sir.

Q. Whereabouts?

A. I first see him when he go to the hospital. I went and visited him.

Q. You visited him in the hospital? A. Yes.

Q. And after he came out of the hospital, did you see him around town?

(Testimony of Mons Halsor.)

A. Yes, pretty near every day.

Q. Did he visit you in your cabin?

A. Yes, sir.

Q. How often?

A. Oh, pretty near every day, every other day and so on; twice a day.

Q. Explain to the jury where that cabin is situated and how you get up to that cabin?

A. The cabin belongs to Bill Ralson. It is behind Otto Inman's shop, boat shop, on the water-front.

Q. How do you get to that cabin?

A. Oh, a kind of crooked alley go down there, with poor sidewalks, holes in the planks; almost look pretty hard, looks pretty hard to go through there.

Q. Is there a stairway leading up to it?

A. There is a stairway goes up, but each side steps was broken out of it. [329]

Q. Steps were broken out? A. Yes.

Q. Was it easy or difficult to walk up those stairs?

A. Difficult.

Q. Mr. McHugh came and visited you in your house? A. Yes.

Mr. WICKERSHAM.—I object to the leading questions.

Q. State whether or not Mr. McHugh visited you?

A. Yes, he came and visited me pretty near every day; twice a day; sometimes at night.

Q. Now, during that time did he ever talk to you about his foot? A. Yes.

(Testimony of Mons Halsor.)'

Q. Just tell the jury what he said?

A. He was drinking at the time and I told him he better be careful and not drink any, because it might not heal on him; his foot might not heal up, and he told me that it's getting well, pretty well along, and he tried to pick around so that he could get a piece of change out of the company.

Q. State whether or not during that time, Mr. McHugh was drinking?

A. Well, I met him on the street lots of times—

Mr. WICKERSHAM.—Well, I object to that statement. You can answer it yes or no.

The COURT.—Yes.

A. Yes; he was drinking.

Q. Just describe to the jury his condition when you saw him?

A. Why, I have met him on the street, and I can see that he was see-sawing along the street, especially at night, before twelve o'clock.

Q. In what part of town? [330]

A. In Indian town.

Q. Did you drink any with him? A. Yes.

Q. How much? A. Oh, quite a bit sometimes.

Q. Did he become intoxicated or not?

A. Yes; he got intoxicated; couldn't hardly talk lots of times.

Q. And that was during what month?

A. Month of, month of June.

Q. During the month of June?

A. Around the 20th.

Q. Now, how long did that keep up, Mr. Halsor?

(Testimony of Mons Halsor.)

A. Looked to me he kept it up until the middle of July, till I left Ketchikan.

Q. And you left the middle of July? A. Yes.

Q. Where did you go?

A. To the Rush & Brown mine.

Q. You went out there to work? A. Yes, sir.

Q. Have you been working there ever since?

A. I have been working until I was subpoenaed.

Mr. ZEIGLER.—That's all.

Cross-examination.

(By Mr. WICKERSHAM.)

Q. Ole, you're a friend of Barney's, aren't you?

A. Yes.

Q. Very dear friend? A. We used to.

Q. Used to. Visited with him frequently? [331]

A. Oh, sure.

Q. When he was sent to the hospital, you went to call on him? A. I did.

Q. And you were friends? A. Yes, sir.

Q. Do you know Hughie Gillis? A. No.

Q. You don't know him? A. No.

Q. Where were you last Friday evening, Ole, about eight or nine o'clock?

A. I don't know. I go out lots of times out in the street.

Q. Were you down at the Stedman Hotel Friday or Saturday evening?

A. I can't remember now. I don't think I was. I am not sure.

Q. You wouldn't be sure. Don't you know that

(Testimony of Mons Halsor.)

you were in the Stedman Hotel Friday or Saturday evening? A. I can't remember.

Q. Didn't you see Hughie Gillis there and talk to him? A. Where is he? Is he in here?

Q. That's the man there (pointing).

A. Oh, yes; that's the man.

Q. Did you see him there? A. Yes.

Q. And you sat there and talked with him quite a while, didn't you, Ole? A. Yes.

Q. Barney came in about that time, didn't he?

A. I didn't notice. [332]

Q. You didn't notice that Barney came in while you were sitting there, talking to Hughie?

A. I don't know. I didn't take notice of anybody.

Q. You didn't take notice of anybody else. Well, didn't you talk to Hughie, then and there, about Barney and this case?

A. Well, I don't think—I doubt it.

Q. You doubt it? A. I might.

Q. You might?

A. I might slip a few words, but I never had any thought of it.

Q. You haven't thought of it since. Well, now, didn't you say to Hughie Gillis at that time and at that place, you and Hughie Gillis being the only persons present, sitting there in those chairs—

A. (Interrupting.) Yes.

Q. (Continuing.) That you had it in for Barney? A. No.

(Testimony of Mons Halsor.)

Q. And that you were going to get even with him when this case came up?

A. I didn't; I didn't say anything of the kind.

Q. You didn't say anything of the kind.

A. I didn't mention any person. I didn't mention any personal names.

Q. Well, didn't you say that?

A. I didn't mention any personal names.

Q. You didn't?

A. I didn't mention any names.

Q. What? A. I didn't mention any names.
[333]

Q. Well, leave his name out. Did you say that about Barney's case and him?

A. No, I didn't mention anything against him or nothing. I never had anything against him.

Q. And didn't you, at the same time and place, you and Hughie being the only ones present, repeat this story that you have just told, about Barney's drinking?

A. I might have told him that on the street, you know. I might have told it on the street. I seen somebody on the street maybe.

Q. I am asking you if you didn't tell Hughie that there at that time? A. Not Barney; not Barney.

Q. You were talking to him, though?

A. Yes; talking to him, but not especially about Barney.

Q. Well, you were talking to him about Barney's drinking?

A. But he might have took it that way.

(Testimony of Mons Halsor.)

Q. He might have taken it that way.

A. He might have took it that way, but I never mentioned his name.

Q. You did not? A. No, sir.

Q. Didn't you, at that same time and place, you and Hughie being the only persons present, tell him that you had been engaged in bootlegging and that it was easy money, and that just as soon as you got some money that you thought you were going to get, you would take him into partners and you would go bootlegging together?

A. He urged me—

Q. Now, I ask you a question. Answer that question. [334]

The COURT.—Yes, or no. You answer it. Then you can explain.

A. I never promised him to go bootlegging with him.

The COURT.—Well, now, answer the question.

A. But he asked me to go bootlegging with him, but I—

Q. (Interrupting.) Oh, he did.

A. He asked me to go bootlegging with him and I said "No."

Q. You have been working over at the Rush & Brown Mine? A. Yes, sir.

Q. Barney and Hughie were over there at work at one time for a short time, weren't they?

A. Yes, sir.

Q. Both of them together? A. Both together.

Q. Do you belong to the I. W. W.?

(Testimony of Mons Halsor.)

A. I belong to the Socialist Party; used to stand for it.

Q. Don't you belong to the I. W. W.?

A. I am consequently—

Q. (Interrupting.) Say, yes or no.

A. No; I don't.

Mr. ROBERTSON.—I think that is immaterial.

Mr. WICKERSHAM.—I think it is very material.

A. I'm a Socialist in my ideas.

Q. And isn't it true that over at the Rush & Brown mine, in the presence of Barney and Hughie Gillis, that you told them that you belonged to the I. W. W., and that it was the only union and that you wound up at that time by denouncing the Government and the courts and everybody engaged in the administration of law— [335]

Mr. ROBERTSON. (Interrupting.) Just a moment, if the Court please. I object to that.

A. If I did—

The COURT. (Interrupting.) Wait a moment.

A. If I did—

Mr. ROBERTSON (Interrupting.) — Wait a moment. I object to that.

A. If I did.

Mr. ROBERTSON. (Interrupting.)—I object to it as being incompetent, irrelevant and immaterial and not cross-examination.

The COURT.—I don't see—

Mr. WICKERSHAM.—It's an impeaching question. I think we have a right under our statute to

(Testimony of Mons Halsor.)

show when a man has become so depraved as this man evidently is.

Mr. ROBERTSON.—Now, if the Court please, we certainly object to that kind of statement.

The COURT.—Yes.

Mr. ROBERTSON.—I want to object to that statement and request the Court to instruct the jury to disregard the statement of counsel.

The COURT. —The jury will be instructed to disregard it. I think that is entirely improper, Judge Wickersham.

Mr. WICKERSHAM.—I'll withdraw it and apologize to the Court. I didn't intend to say it in that language exactly.

The COURT.—I don't think it is material. If you can test him as to his veracity in any matter—

A. We was together once and he said—

Mr. ROBERTSON.—Wait a moment. [336]

The COURT.—I sustain the objection.

Mr. WICKERSHAM.—We take an exception, may it please the Court.

The COURT.—Yes.

Q. Have you been engaged in bootlegging yourself? A. No, sir.

Q. Didn't you tell Hughie Gillis that night, down at the Stedman, that you had been?

A. No, sir. Yes; for my own use.

Q. Oh, just for your own use?

A. For my own use.

Mr. WICKERSHAM.—That's all.

Mr. ZIEGLER.—I think that' all.

(Testimony of O. W. Pollow.)

If the Court please, there has been no return on the subpoena issued Monday morning for Doctor Ellis, from the west coast, and I anticipated that they would be in town yesterday. I have heard nothing from them, whether he is coming in obedience to the subpoena or not, and for that reason I take it that he may be in town to-day, and if the Court will let the case go over now until two o'clock, it may be that he will arrive in town. Of course, if he doesn't we can't ask for any further indulgence.

Mr. WICKERSHAM.—I won't make any objection. I think we ought to have fairness.

The COURT.—I think so too. Probably, I'll give you till later along in the afternoon.

Mr. WICKERSHAM.—I won't object to their putting him on any time before the case is concluded.

(Whereupon recess was taken until 2 P. M. this day.) [337]

2 o'clock P. M., March 28, 1923, Wednesday.

Court met pursuant to recess.

Mr. ROBERTSON.—I want to recall Mr. Pollow and ask one question.

The COURT.—You may.

**Testimony of O. W. Pollow, for Defendant
(Recalled).**

O. W. POLLOW, recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Mr. Pollow, will you kindly state how far, or

(Testimony of O. W. Pollow.)

to what extent, the bail on this coal tub would clear the rear rim of the coal tub?

A. The bail in falling back?

A. Yes, sir; in falling backwards or in being moved back down over in its arc (illustrating), the bail being moved back over that way, due, of course, to the tub swinging up that way (indicating); how much clearance would there be between the bail and the rim of the tub? A. About six or eight inches.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—No questions.

Mr. ROBERTSON.—Defendant rests.

Whereupon the plaintiff, further to maintain the issues on his part, introduced the following evidence, to wit:

REBUTTAL.

Testimony of Hughie Gillis, for Plaintiff (Recalled in Rebuttal).

HUGHIE GILLIS, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows: [338]

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. Gillis, state your name, please?

A. Hughie Gillis.

Q. Where do you reside now?

A. At Hyder, Alaska.

Q. How do you happen to be here at Ketchikan at this time?

(Testimony of Hughie Gillis.)

A. I came up on the last boat from Hyder, as a Government witness.

Q. In another case? A. Yes, sir.

Q. When did you come?

A. I got into town about two o'clock last Thursday, I believe; two o'clock last Thursday.

Q. Are you engaged in any work at Hyder?

A. Yes, sir.

Q. Are you going back when your service is over here? A. I intend to; yes.

Q. Do you know this man Ole, or what is his name?

Mr. ZIEGLER.—Halsor.

Q. Mons Halsor? A. Who?

Q. Mons Halsor, who was on the witness-stand this morning? A. Yes, sir; but only by "Ole."

Q. Did you have occasion to meet him last Friday or Saturday evening at any time?

A. On Friday, I believe it was; Friday afternoon.

Q. Where? A. In the Stedman Hotel.

Q. Did you have any conversation with him there? [339] A. I did; yes.

Q. Who was present besides you and Ole?

A. Well, there was quite a few in the hotel and sitting room.

Q. Who was talking with you and Ole?

A. Just him and I alone.

Q. What time of the day was it, do you think?

A. It was in the afternoon, but I can't say exactly what time it was.

Q. Who else was there at that time, that you knew?

(Testimony of Hughie Gillis.)

A. Well, Barney McHugh was there.

Q. Yes.

A. He come in, and we were talking a little while.

Q. Was Barney talking to you and Ole?

A. No, sir.

Q. Now, if you had any conversation with Ole at that time about this case and about Barney McHugh, I wish you would state it.

Mr. ZIEGLER.—Just a moment, if the Court please. I don't think that is a proper question. He has asked the impeaching question of the witness Halsor on the stand.

The COURT.—Yes; objection sustained.

Q. At that time and place, you and Ole being alone and talking together, what did he say to you about 'getting even with Barney McHugh?

A. Well—

Q. Go ahead.

A. He said that he would get even with that dude the day of his trial in his case with the steamship company.

Q. Did he say anything else in relation to that matter? [340]

A. Well, yes; he told me the reason first. There was a grudge between them. He claimed that Barney McHugh stole five gallons of moonshine out of his cabin.

Q. And he was going to get even with him for it?

A. Exactly, them were the very words he said.

Q. What did you say in answer to that?

Mr. ROBERTSON.—That is immaterial, if the Court please.

(Testimony of Hughie Gillis.)

The COURT.—Yes.

Q. How long have you known Ole?

A. Well, I met him out at the Rush & Brown mine.

Q. When?

A. The last of the year 1921. I think it was just before Christmas.

Q. Who was with you when you met him there?

A. Well, Barney McHugh and others were there.

Q. Do you remember having any conversation with Ole there?

Mr. ZIEGLER.—Just a moment, if the Court please. We object to that, any conversation at that time, as incompetent, irrelevant and immaterial. Before this accident happened.

Mr. WICKERSHAM.—Well, it has reference to the other impeaching question I asked Ole.

Mr. ROBERTSON.—That question is not permitted. The Court ruled that out.

The COURT.—What is that?

Mr. WICKERSHAM.—In respect to his being a member of the I. W. W., and the other statement that I made, the other question that I asked at that time.

The COURT.—Yes.

Mr. WICKERSHAM.—We offer that for the purpose of impeachment. [341]

The COURT.—Objection sustained.

Mr. WICKERSHAM.—We desire to make the offer in the record, may it please the Court.

The COURT.—You may.

Mr. WICKERSHAM.—We offer to show by this

(Testimony of Hughie Gillis.)

witness and by Barney McHugh also, who has appeared as a witness, that at that time and place they were talking with this man and he was talking generally to people around him, and that he announced publicly that he was an I. W. W., and that it was the only union and the best union and then began a general denunciation of the Government of the United States and its officers. We offer to prove that by these two witnesses.

The COURT.—Offer denied.

Mr. WICKERSHAM.—We note an exception.

Mr. ZIEGLER.—Now, if the Court please, I think that the jury ought to be instructed that they are not to take that into consideration, because that opens up the question as to whether or not this man himself may not have been an I. W. W., and McHugh, and we—

The COURT. (Interrupting.) Just wait a moment. The jury will be properly instructed on that point when the time comes for so doing. I told you that this morning.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. How long have you known Ole?

A. Well, as I said, I knew him up at the mine there, during the time I was there. I think it was about two weeks, so far as I remember, and then I met him here a couple of times [342] you see, coming in, and after coming in from Hyder last week.

Q. You had not seen him any time between?

(Testimony of Hughie Gillis.)

A. I can't remember having seen him.

Q. Did you know him before you met him at the Rush & Brown mine?

A. I don't think I did. I don't remember having met him before.

Q. Did you know Barney McHugh before that?

A. I did; yes, sir.

Q. How long had you known Barney?

A. I think it was some time in September, 1920, that I first seen Barney.

Q. Did you live in Ketchikan at that time?

A. No; no.

Q. Do you personally know whether or not this statement that you say Ole made to you, was true?

A. Which statement?

Q. In which he said that, in which you said that he told you that Barney McHugh had stolen five gallons of moonshine. Do you know whether or not that was true that Barney McHugh did steal five gallons of moonshine from him?

A. I don't know anything about it, only Ole told me.

Q. You know nothing whatsoever about it?

A. No, sir.

Q. You have been an interested spectator at this trial since its commencement, haven't you?

A. I was here a while every day.

Q. And you are quite interested in seeing the outcome in Mr. McHugh's favor? [343]

A. I can't say that I am.

Q. And you have been during the entire trial of this case? A. I can't say that I am.

Q. You can't say that you are?

(Testimony of Hughie Gillis.)

A. No; I don't see why; I don't see why I should. McHugh isn't anything to me more than a slight acquaintance.

Q. McHugh is only a slight acquaintance?

A. Yes.

Q. And Ole is a still slighter acquaintance?

A. Yes; he is. There's hundreds of workingmen that I am better acquainted with than Mr. McHugh.

Mr. ROBERTSON.—That's all.

Mr. WICKERSHAM.—That's all.

Testimony of J. H. Mustard, for Plaintiff (Recalled in Rebuttal).

J. H. MUSTARD, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Doctor Mustard, you have been sworn in this case? A. Yes, sir.

Q. When did the plaintiff in this case come to see you the first time about his foot?

A. About the middle of May.

Q. Last year? A. Last year.

Q. Please state to the court and jury the condition of his foot when you first saw it?

Mr. ROBERTSON.—Well, that is not proper rebuttal.

Mr. WICKERSHAM.—As to the appearance and general condition of his foot? [344]

Mr. ROBERTSON.—If the Court please, that is not proper rebuttal.

Mr. WICKERSHAM.—That is in rebuttal of Doctor Story's statement.

The COURT.—But he testified to that on his examination in chief. It is a part of your case in chief and the doctor testified to that—as to the condition of the foot when he first saw it.

Mr. WICKERSHAM.—We offer it, of course, in rebuttal of Doctor Story's statement or testimony.

The COURT.—I understand what your purpose is, but it is a part of your case in chief. Doctor Mustard testified to the condition of the foot when he first saw it.

Mr. WICKERSHAM.—Well, if it is in the record. My memory is that it doesn't show the facts that we have in contemplation now as to the discoloration.

The COURT.—Any objections to the reporter's reading it out?

Mr. ROBERTSON.—We think that this is going to be an endless proposition.

The COURT.—Why, certainly; I'm with you if you have any objection.

Mr. ROBERTSON.—Yes, sir; we object to it.

The COURT.—The jury will retire and it may be read to the court. What is your question, Judge Wickersham?

Mr. WICKERSHAM.—My question is as to the condition and appearance of his foot at the time he first examined it, about the 15th of May, 1922—the outside appearance of the foot.

Mr. ROBERTSON.—We object to that as not proper rebuttal.

(Testimony of J. H. Mustard.)

The COURT.—Objection overruled. It is with reference to [345] the outside appearance of the foot.

A. The foot was discolored somewhat and considerably swollen, the first time I saw it.

Q. To what extent was it discolored and where?

A. Oh, it was—when the shoe had been removed and the stocking and the foot remained on the floor for a few minutes, it was discolored a darkish red, whereas the other foot was not.

Q. How much of a swelling was there of the foot at that time?

A. I didn't take any measurements. There was a fair degree.

Q. Was it recent or apparently of some age?

A. The condition of the skin was a rather unhealthy condition. That is found after any fracture. As to whether the swelling was recent or not, I couldn't say from looking at it; that is a matter of deduction.

Q. You know the history of the case?

A. Yes, sir; slightly familiar with the case.

Q. Assuming that the cast had been taken off his foot on the 24th of April, was the foot in any different situation than you would have expected of that sort of operation at that time?

Mr. ROBERTSON.—We don't think there is a proper foundation laid for that, if the Court please. It seems to me you would have to first show that he knew the actual condition when the cast was taken off.

(Testimony of J. H. Mustard.)

"The COURT.—Yes; I think so; and I don't think the doctor is in a position to say what the condition of the foot was when the cast was taken off.

Mr. WICKERSHAM.—All right.

Cross-examination.

(By Mr. ROBERTSON.) [346]

Q. The foot still has some discoloration?

A. Possibly some.

Q. I mean when you were noticing it yesterday?

A. It may have some.

Q. And the plates that you saw, doctor, state whether or not they showed a perfect healing of the fracture? A. Perfect; yes, sir.

Mr. ROBERTSON.—I think that's all.

Mr. WICKERSHAM.—That's all.

Testimony of John G. Young, for Plaintiff (Recalled in Rebuttal).

JOHN G. YOUNG, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. Mr. Young, referring to this bucket which came up from the hold of the steamer "Latouche" and which you testified was out of order on the night of March eight and ninth, 1922, state whether it had any beackets or ropes attached to it in any way for the purpose of pulling it?

Mr. ROBERTSON.—Now, if the Court please, that is not proper rebuttal. Mr. Young has already testified to that.

(Testimony of Harry Gillis.)

The COURT.—I'm inclined to think so.

Mr. WICKERSHAM.—Well, we offer to show that he will say that there were none on it, but if that is the Court's recollection, we will let it go at that.

The COURT.—Yes, he testified to that.

Mr. WICKERSHAM.—Well, I don't want to have any misunderstanding on the part of the Court as to what he did testify to. His testimony is in the record.

The COURT.—Objection sustained. [347]

Mr. WICKERSHAM.—We offer to show by this witness, that there were no ropes or beackets on the bucket at that time.

(Testimony of witness on examination in chief read by reporter.)

The COURT.—I don't think you can show that by his testimony, because he says he doesn't remember.

Testimony of Harry Gillis, for Plaintiff (Recalled in Rebuttal).

HARRY GILLIS, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM).

Q. Mr. Gillis, you were on the stand before?

A. Yes, sir.

Q. What time did you go to work on the night of March 8, 1922, in the hold of this boat.

(Testimony of Harry Gillis.)

A. It was about one; about one thirty.

Q. About one thirty?

A. Somewheres around there.

Q. Was any instruction given to you at that time, or at any time on that boat by Mr. Pollow, the mate, or by any other officer or any other person on the boat, in regard to the manner of handling these buckets? A. No, sir.

Mr. ROBERTSON.—We object to that as not proper rebuttal. This man has already testified to that on his case in chief.

The COURT.—Objection overruled.

A. No, sir.

Q. What is that? A. No, sir.

Q. Did you see him in the hold, giving any instructions about anything that night?

A. No, sir. [348]

Q. Was he there at any time giving any instructions while you were there, before Barney was hurt?

A. I wasn't there before Barney was hurt.

Q. I say, was he there at any time, giving any instructions, before he was hurt.

A. I don't know, I wasn't there.

Mr. ROBERTSON.—He wasn't there before Barney was hurt.

Q. But from the time you came there until—did you hear him give any instructions about the handling of these buckets? A. No, sir.

Mr. WICKERSHAM.—Now, we offer to show by this witness about the becket.

The COURT.—He has already testified to it in

(Testimony of Harry Gillis.)

the examination in chief. It's a part of your case in chief? It will be endless if I let this testimony go in. They cannot testify on the same subject back and forth.

Mr. WICKERSHAM.—Well, we will be very brief.

The COURT.—He has already testified to that plainly and repeatedly.

Q. Did you testify before which side of the hold Barney and his bucket crew were working on?

A. Yes, sir.

Q. You did testify to that?

A. Yes, sir; I think I did. I wouldn't swear to it, though, Judge.

The COURT.—Yes; he testified that it was on the starboard side.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.) [349]

Q. I understood you to say, then, that you didn't go to work until after Barney was hurt?

A. I didn't; absolutely not.

Q. And you weren't on the ship at that time?

A. No, sir.

Mr. ROBERTSON.—That's all.

Testimony of Frank Williams, for Plaintiff (Recalled in Rebuttal).

FRANK WILLIAMS, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What time did you go to work in the hold of the steamer "Latouche" that night?

A. One o'clock after midnight.

Q. I will ask you then, if Mr. Pollow, the mate, or any other officer of the boat, or any one else gave you and the men who were working there, or any of you in the hold that night, any instructions about how to manage those buckets?

A. Not till after Barney McHugh got hurt.

Q. Not till after Barney was hurt?

A. Yes, sir.

Mr. WICKERSHAM.—We want to ask this witness the same question about the beckets. I don't know whether he testified to that or not before. What is the Court's memory?

The COURT.—I don't remember about this witness. I think he was asked the question on cross-examination. I'm inclined to think so.

Mr. WICKERSHAM.—We want to ask him the question then.

Q. Were there any ropes or attachments to handles on the *si* of the front of the bucket here (indicating) or anywhere [350] on the bucket

(Testimony of Frank Williams.)

for the purpose of managing the bucket or turning it or pulling it in any way?

Mr. ROBERTSON.—I object to that as leading and nor proper rebuttal. This witness testified on his case in chief, as to what his recollection of that was, if the Court please, and I will ask that my recollection of that be corroborated by the reporter's notes.

(Whereupon matter referred to was read by reporter from his notes.)

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. You didn't go to work until after one o'clock?

A. One o'clock after midnight.

Q. Pardon me?

A. One o'clock after midnight.

Q. And the mate did give some instructions after Barney McHugh was hurt? A. Afterward; yes.

Q. You remember that quite distinctly?

A. Yes, sir; and he split us up on them two tubs.

Q. What?

A. He was laying the tub aside and he puts two, the two of us, one on each bucket, and that made four on to a bucket.

Mr. ROBERTSON.—That's all.

Testimony of Alvin Sodaberg, for Plaintiff (Recalled in Rebuttal).

ALVIN SODABERG, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Judge WICKERSHAM.) [351]

Q. Mr. Sodaberg, when did you go to work that night? A. At one o'clock.

Q. At one o'clock? A. Yes.

Q. Did this mate, Mr. Pollow, at any time, or any officer of the boat, or any other person, give you or the men there engaged in that work any instructions that night or at any time with respect to handling those buckets? A. No, sir.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Didn't give any instructions at all that night? A. Not as to how to handle the buckets.

Q. Never said a word about it at all?

A. No, sir.

Mr. ROBERTSON.—That's all.

Testimony of Bernard McHugh, for Plaintiff (Recalled in Rebuttal).

BERNARD McHUGH, the plaintiff herein, upon being recalled, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What time did you get to work that night on the "Latouche"? A. Seven o'clock.

Q. Seven o'clock in the evening?

A. In the evening.

Q. Did this mate, Mr. Pollow, or any other officer of the boat then, or at any time, before you were hurt at about one o'clock give you or the men in your presence, any instructions [352] with respect to handling these, with respect to the manner of handling these tubs?

A. There was no instructions given to me or the men in the hold during the working hours that I worked aboard the boat.

Mr. WICKERSHAM.—That's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Do you hear pretty well now, Barney?

Mr. WICKERSHAM.—Well, now, we object to that. He asked Barney all about his hearing before, eyesight and everything else.

Mr. ROBERTSON.—All right.

Mr. WICKERSHAM.—Now, may it please the

Court, I want to introduce in evidence the original answer in this case.

Mr. ROBERTSON.—We object to it as incompetent, irrelevant and immaterial.

Mr. WICKERSHAM.—Oh, I think it is material.

The COURT.—It may be received in evidence.

Whereupon defendant's original answer herein was received and marked in evidence Plaintiff's Exhibit —, which said exhibit is in words and figures as follows, to wit:

Plaintiff's Exhibit —.

“In the District Court for the District of Alaska.
Division Number One at Juneau.

No. 2212-A.—(566-KA).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,
tion,

Defendant.

ANSWER.

Comes now defendant and, for answer to the complaint herein, admits, denies and alleges:

I.

Defendant admits paragraph I of the complaint.

II.

Defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the Steamship ‘La-touche,’ which vessel was then owned and being

operated by defendant; and the defendant denies each and every other [353] allegation contained in paragraph II of said complaint.

III.

Defendant denies paragraph III of said complaint.

IV.

Defendant denies paragraph IV of said complaint.

V.

Defendant denies paragraph V of said complaint.

AND AS A FURTHER, SEPARATE AND FIRST AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the territory of Alaska, and that it has paid its annual corporation license tax last due to said territory.

II.

That on or about March 8th, 1922, defendant employed plaintiff together with and as a member of a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship 'Latouche' on to a dock or wharf at the port of Ketchikan, Alaska; that all of said stevedores and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal from vessels on to docks and wharves at said port, and were then

and there fellow-servants of each other and of plaintiff and engaged in the same common and general employment, i. e.: unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform said work, according to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.: Tongass Narrows, in the territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with coal tubs and other appliances, in safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that, while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the danger likely to result therefrom, voluntarily, carelessly and negligently and while aboard said vessel sought to and did move a certain tub, that was used to carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as they then and there well knew was customary, proper and safe, moving said tub forward by pulling on the beekets with which for that purpose said tub was provided and by which said tub could have been safely moved, and that said plaintiff and his said fellow-servants by their said

shoving on said tub forced the body of said tub forward and caused the handle with which said tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward under the forward impetus so given to the body of said tub by the said negligent shoving of plaintiff and his said fellow-servants; and that said careless, voluntary and negligent acts aforesaid of said plaintiff and of his said fellow-servants, so committed by them with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by the defendant. [354]

AND AS A FURTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE, defendant alleges:

I.

That defendant is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said territory.

II.

That on or about March 8, 1922, the plaintiff, being then and there a man of full age and experi-

ence in the unloading and discharging of coal and freight from vessels on to docks and wharves at the Port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such work and of work on or about steamships while unloading and discharging coal, was employed by the defendant together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the defendant's steamship 'LaTouche' at said port; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, i. e.; Tongass Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter, while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub, with which plaintiff was then and there thoroughly conversant and with which he had then and theretofore been doing said work without any complaint or objection to its condition, although he was then and there entirely familiar with such appliances and with the methods of their use, and which tub was used to

carry coal in and out of the hold of said vessel, by shoving on said tub from the rearward, instead of, as he then and there well knew was customary, proper and safe, moving and assisting to move said tub by pulling on the becketts with which for that purpose said tub was provided and by which said tub could have been safely moved, and that plaintiff by his said shoving and assisting to shove said tub forward from the rear caused, as plaintiff then and there well knew was likely to result, the handle with which said tub was provided to fall rearward, and plaintiff, being so negligently at the rear of said tub, was struck by said handle as it so fell rearward under the forward impetus so given to the body of said tub by the said negligent shoving and assistance in shoving of plaintiff; and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had assumed said risks and dangers and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by the defendant.

WHEREFORE defendant prays that it may go hence without day, and that plaintiff recover nothing by this action, and that defendant have judg-

ment against plaintiff for its costs and disbursements herein incurred.

(Signed) A. H. ZIEGLER,

(Signed) R. E. ROBERTSON,

Attorneys for Defendant. [355]

United States of America,
Territory of Alaska,—ss.

Willis E. Nowell, being first duly sworn on oath, deposes and says: That he is a resident of the Territory of Alaska, over the age of 21 years, and agent of the corporation defendant; that he has read the foregoing answer, and knows the contents thereof, and that the same is true as he verily believes; that the reason he makes this verification is that there is no president, vice-president or other acting head of said corporate defendant now in or a resident of said territory.

(Signed) WILLIS E. NOWELL.

Subscribed and sworn to before me this 27th day of October, 1922.

(Signed) R. E. ROBERTSON,

Notary Public for Alaska.

My commission expires June 20, 1925.

Copy of the within answer received this 27th day of October, 1922.

WICKERSHAM & KEHOE,

Of Counsel for Plaintiff."

Filed Oct. 27, 1922.

Mr. WICKERSHAM.—I understand, then, from what the Court said when this matter was up before,

that I may also refer to the answer and to the affidavit of Mr. Robertson?

The COURT.—Yes, I think so.

Mr. WICKERSHAM.—That is our case, then. We rest.

Recess until 4 P. M. this day, March 28, 1923.

4 P. M., March 28, 1923.

Court met pursuant to recess.

Upon statement of counsel for defendant that Doctor Ellis had not arrived and no response had been received from him, an adjournment was taken until 10 o'clock A. M., March 29, 1923.

Thursday, March 29, A. D. 1923.

Court met pursuant to adjournment at 10 o'clock A. M.

Mr. ROBERTSON.—I desire, if the Court please, at this time to present a few supplemental instructions on behalf of the defendant, and I will give the counsel for plaintiff a copy of those.

I may also say, if the Court please, that the witness whom we have been expecting and for whom the Court continued the case until this morning, has not arrived, and under the circumstances of the case, we will not ask for further time. We would like to know whether or not counsel is willing to agree that the pictures may go—

Mr. WICKERSHAM.—No; they may be presented to the jury for what they are [356] worth.

The COURT.—Mark them as exhibits in the case under the stipulation of counsel.

Mr. ROBERTSON.—With that, we rest, if the Court please. We desire at this time, if the Court

please, to present and file our motion for a directed verdict for the defendant in this case; which said motion is in words as follows, to wit:

“Comes now the defendant and respectfully moves the Court that the jury be directed to return a verdict herein for the defendant and against the plaintiff, for the reason that neither the law nor the evidence adduced at the trial of the above-entitled action is sufficient to support or warrant a verdict or judgment for the plaintiff in any sum whatsoever.”

The COURT.—Motion will be denied.

Mr. ROBERTSON.—We take an exception.

Thereupon defendant presented in writing and filed its requested instruction No. 1, to wit:

“I instruct you that in law the plaintiff is not without fault, if it appears from the evidence that by the exercise of any care and caution which was, under the circumstances, reasonable, practicable and available, he might have avoided the injury charged.”

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 2, to wit:

“I instruct you that it is the duty of an employee to exercise ordinary and reasonable care in the protection of himself in the performance of his work and if he does not do so, and his want of care contributes in any degree, however slight, to any injury to himself, then he is guilty of contributory negligence, and cannot recover

damages from his employer, even though the employer was negligent. If you find, from a preponderance of the evidence, that the plaintiff McHugh, in his work about, or in pulling on the rear rim of, the coal tub in the manner that he did, did not exercise what was reasonable prudence and care under the circumstances, and that his want of care contributed to the happening of the injury complained of, then your verdict must be for the defendant, Alaska Steamship Company.”

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested [357] instruction No. 3, to wit:

“I instruct you that contributory negligence is the want of ordinary care on the part of the party injured; that is to say, it is not the want of such care as an unusually prudent person would take, but the want of such care as an ordinarily prudent person would exercise under the same or similar circumstances, which, either by itself or concurring with the negligence of the defendant, if any, proximately causes the injury.”

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 5, to wit:

“I instruct you that if you find from the preponderance of the evidence that the plaintiff

took hold of the rear rim of the coal tub in question and pulled or shoved thereon, and that when he did so he knew that the bail of said coal tub, if it should fall, could only fall toward the rear and not toward the front of said tub, and that he could have taken hold of said tub by the rim forward of the bail thereon, or by handles attached to the lip of the tub, or beekets attached to said handles, instead of taking hold of said tub by the rear rim thereof, and that by so doing he could have moved the tub in safety, and that he took hold of the said rear rim of said tub and pulling or shoving thereon was a dangerous way of moving said tub, and that to take hold of the rim of said tub forward of the bail or by handles or beekets attached to said handles on the lip of said tub was a safe way of moving said tub, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, in such case the jury will find for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 6, to wit:

"I instruct you that if you find from the preponderance of the evidence that the plaintiff was directed in moving the coal tub on which he was working to move the same forward with its lip or nose in a forward position, and to so move it forward by pulling on the handles or

beckets attached to said handles on the lip of said tub, if you find there were any such handles or beekets, or by taking hold of said tub forward of the bail, and you further find that such was a safe way to move said tub, and that it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, moved said tub either by pulling or shoving on the rear rim, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and in such case you should find for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 7, to wit:
[358]

"I instruct you that if you believe that plaintiff was injured by reason of the bail of the coal tub falling against or upon his foot, and if you find that the condition of said tub including the bail thereof and the trigger or catch, was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, confronting him in the use of said tub, and if you find from a preponderance of the evidence that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in undertaking to do the work at which he was engaged that would or should

ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was working pursuant to instructions of the defendant, if you should so find."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 8, to wit:

"I instruct you that if you find that the plaintiff was injured by reason of the bail of the coal tub in question falling upon or against him, and if you find from a preponderance of the evidence that the condition and manner in which said bail was operated and held in place and released was open and obvious to plaintiff, and if you find from a preponderance of the evidence that plaintiff was of sufficient intelligence to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then plaintiff cannot recover anything in this case even if the defendant company was at fault and negligent in allowing said coal tub to be used by the plaintiff or in permitting the trigger or catch on the bail thereof to be out of order, if you find by the preponderance of the evidence that such is the fact and in such case you will render your verdict for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 10, to wit:

“I instruct you further that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to remedy the defect; and in the event that the master does so promise, the servant may, by relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and if you believe in this case that the tub with which the plaintiff was working, that the trigger or catch holding the bail in place thereon was defective, and that the defendant company promised to remedy the same but failed to do so within a reasonable time after such promise, and that McHugh continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such an event, I instruct you that McHugh [359] assumed the addi-

tional risk of the defect, if any, in said tub, and you will return a verdict for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 12, to wit:

"You are instructed that if McHugh engaged with the Alaska Steamship Company in the work of unloading or assisting to unload coal from the steamship 'Latouche' without at the time fully understanding or comprehending the dangers incident to such work, yet if you find that between the time of his employment and the time he was injured he learned of those dangers, if any, or in the course of his employment ought to have known of the liability to accident by being hit by the bail of the coal tub if the same should fall, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the Alaska Steamship Company."

Thereupon the Court refused to give said instruction, to which refusal defendant duly objected.

Thereupon the defendant presented in writing and filed its requested instruction No. 16, to wit:

"You are instructed that the Alaska Steamship Company is not responsible for the negligence of McHugh's fellow-servants, if the jury believes from the evidence that plaintiff's fellow-servants were guilty of negligence, and that such negligence caused the accident by which

plaintiff claims to have been injured. The term 'fellow-servants' as used in these instructions means those who were engaged with the plaintiff in the same work, without any relation to each other, except as co-laborers, and without rank."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its requested instruction No. 17, to wit:

"You are instructed in this case that if you find from the preponderance of the evidence that the injury which McHugh claims to have suffered was caused by the negligence of his fellow-servants, that is, if his fellow-servants so negligently handled, moved, pulled or shoved the coal tub with or about which McHugh was working, so as to cause the bail or handle thereof to fall and strike McHugh and to cause said injury, then your verdict should be for the defendant."

Thereupon the Court refused to give said instruction, to which refusal defendant duly excepted.

Thereupon the defendant presented in writing and filed its supplemental requested instruction No. 1, to wit: [360]

"I instruct you that negligence is defined as being the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

And in this case you cannot find a verdict for the plaintiff McHugh in any amount whatsoever unless you first find by a preponderance of the evidence that the injury, if any, sustained by him and the damages, if any, incurring to him by reason thereof, were the result of negligence, as hereinbefore defined, of the defendant Alaska Steamship Company, or its officers, agents, or employees, or by reason of some defect or insufficiency due to its or their negligence, as hereinbefore defined, in the coal tub or bucket with which said plaintiff McHugh claims to have been working.

In this behalf, I instruct you that the mere occurrence of the injury, or of the damage complained of, if you find by a preponderance of the evidence that the plaintiff McHugh did sustain said injury and damages, is no evidence of negligence on the part of the defendant Alaska Steamship Company or of any of its officers, agents or employees or that the existence of a defect or insufficiency if you so find, in said coal tub or bucket was due to its or their negligence; and I further instruct you that the burden is on the plaintiff McHugh to show, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence, as hereinbefore defined, which proximately caused the injury and damage. The plaintiff McHugh has the burden of proving, by a preponderance of the evidence,

that the defendant Alaska Steamship Company was guilty of negligence.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly excepted.

Thereupon defendant presented in writing and filed its supplemental requested instruction No. 3, to wit:

“I instruct you that the mere fact that you find from a preponderance of the evidence that the bail of the coal tub on or about which McHugh claims to have been working fell upon or came in contact with his foot and injured it as claimed by him and that he suffers damages therefrom as contended by him, is no evidence of negligence on the part of the defendant Alaska Steamship Company or any of its officers, agents or employees or that the defect, if you find by a preponderance of the evidence that there was a defect, in said tub or bucket was due to its or their negligence, but the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company was guilty of negligence which proximately caused said, if any, injury, and said, if any, damages, that is to say, the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company or its officers, agents or employees failed to observe, for the protection of said McHugh while he was working on said vessel ‘Latouche’ on March 9, 1922, that degree

of care, precaution and vigilance which the circumstances in connection with said work justly demanded, and that by reason thereof said McHugh suffered said injury and damages.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly excepted.

Thereupon defendant presented in writing and filed its supplemental requested instruction No. 4, to wit: [361]

“I instruct you that in this case even though you should find the defendant Alaska Steamship Company guilty of negligence from a preponderance of the evidence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been permanently injured for the reason that there is no evidence in this case that said McHugh has been permanently injured.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly objected.

Thereupon defendant presented in writing and filed its supplemental instruction No. 5, to wit:

“I instruct you that in this case even though you should find from a preponderance of the evidence the defendant Alaska Steamship Company guilty of negligence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been perma-

nently incapacitated for the reason that there is no evidence in this case that said McHugh has been permanently incapacitated in his earning power.”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly objected.

Thereupon defendant presented in writing and filed its supplemental instruction No. 6, to wit:

“I instruct you that you cannot find the defendant Alaska Steamship Company guilty of negligence in this case unless you find from a preponderance of the evidence that it had knowledge of the defect, if any, in the coal tub or bucket being used by McHugh or that it should have, in the exercise of ordinary care, acquired such knowledge. I instruct you that it is a rule of law that the master is not usually liable for latent defects, nor is he liable for defects arising so short a time prior to the accident, if any, as not to have been discovered by him in the course of his reasonable inspections. In this case the Alaska Steamship Company is known as the ‘master,’ and the plaintiff is known as the ‘servant.’ ”

Thereupon the Court refused to give said supplemental instruction, to which refusal defendant duly objected.

And thereupon plaintiff, by his counsel, submitted his argument in chief to the jury, and thereafter defendant, by its counsel, submitted its argument to the jury, and thereupon plaintiff, by his counsel,

submitted his argument on rebuttal to the jury, and in said argument on rebuttal by plaintiff's said counsel, the said counsel made the following statement, to wit:

"Now, both attorneys talked about Barney's drinking and being on a spree, and they said that this damage to his foot might have been produced that way. Well, it might have been produced in a thousand different ways. But it wasn't! Doctor Mustard swore to you men positively—and there was nobody brought here to question him. They didn't even ask Doctor Story about it—Doctor Mustard swore positively that that foot was injured at the same time that the other [362] two bones were broken by that big, round iron nub which struck the bone, sunk in and broke it and bruised the foot."

And thereupon defendant, by its counsel, R. E. Robertson, made the following objection and motion:

"I object to that statement and ask to have it stricken from the record. Doctor Mustard didn't testify that way."

and thereupon the Court made the following ruling:

"The motion will be denied. The jury know what Doctor Mustard testified to and the jury will be instructed not to take any notice of statements of counsel which are not borne out by the evidence."

And thereafter, upon the conclusion of the re-

spective arguments, the Court instructed the jury as follows:

Instructions of Court to the Jury.

Gentlemen of the jury: Counsel have concluded their arguments and it now becomes my duty to instruct you as to the law in the case. Counsel for plaintiff has asked that the instructions be given to you in writing, so the instructions will be given to you accordingly. Some of the instructions, however, will be read to you from instructions presented to the Court by counsel on either side. [363] in addition to those of the Court, a copy of which will be given you. Those instructions which are crossed out you should pay no attention to, and where you will find on the margin of certain proposed instructions the words "not given," you will pay no attention to such proposed instructions, because the Court does not consider such instructions applicable to the case or belonging to the law of the case, or because such instructions have been covered by the instructions already given by the Court.

In this case the plaintiff, Bernard McHugh, is suing the defendant, the Alaska Steamship Company, for damages in the sum of \$10,000, for an injury to his person, alleged to have occurred through the negligence of the defendant company in failing to provide him with a safe place to work and also safe appliances with which to work. The defendant, while denying any negligence on its part, alleges that such an injury, if plaintiff received

any, arose from the danger and risk which the plaintiff assumed, and also that the injury, if any received by the plaintiff, was caused by his own contributory negligence.

The plaintiff, in his complaint, alleges, in paragraph one, that at all times mentioned in the complaint and for a long time prior thereto the defendant was and at all times since the injury complained of therein, has been, and now is, a corporation organized and existing under the laws of the State of Nevada, and was at all such times and now is, engaged in business as a common carrier of freight in the coastwise carrying trade, in the waters of Alaska, and within the jurisdiction of the Court.

He further states, in paragraph 2 of his complaint, that [364] on the eighth day of March, 1922, at Ketchikan, Alaska, within the jurisdiction of this Court he, the plaintiff was employed by the defendant, the Alaska Steamship Company, as a stevedore in assisting other of defendant's employees to unload coal from the steamship "Latouche," which said steamship was then owned and being operated by the said defendant; that in the course of his said employment the plaintiff was ordered by the defendant, and was engaged by it, to shovel coal, in the hold of said steamship into a certain iron bucket then in the hold of said vessel and furnished by the defendant for that purpose, and in pulling said bucket on the floor of said hold to the point thereon where it could be filled by plaintiff and the other employees of the defendant in said hold; that said iron bucket was a large and heavy

appliance and required the united efforts of three men to so pull it to the point where it could be so filled with coal; and was so constructed with a large and heavy handle held in place by an iron trigger; and that it was then so worn and in an unsafe and dangerous condition from long wear and hard usage as to be a dangerous and unsafe appliance for such work, all of which was well known to the defendant; that while the plaintiff, with two other employees of the defendant at said time and place was so engaged in pulling the said large iron bucket on the floor of the said hold to the point needed for loading, the said defective and worn trigger thereon became and was loosed and caused the heavy iron handle of the said heavy iron bucket to loosen and fall, and the said heavy iron handle did, without any fault or negligence of the plaintiff, become loose and did fall upon the plaintiff's foot and did strike plaintiff's foot on and across the instep thereof, and did break and crush the bones and tendons, muscle and flesh of the said foot [365] crippling the plaintiff for life; that the plaintiff was thereby so injured in his said foot and in his health and nervous system that he was thereafter in the hospital under medical treatment for many weeks and suffered and now suffers great pain, and was ever since and now is unable to walk or work at his labor as a stevedore, or to do any work of any kind; that plaintiff thereby suffered great pain and a permanent injury to his said foot and general health and was thereby compelled to suspend all his labors and thereby suffered the loss

of wages from said March 8, 1922, to the date of his complaint, being the 26th day of July, 1922, that he will not be able to work for months yet to come and is crippled and injured therein and thereby permanently in said foot, and that plaintiff was so injured in the sum of Ten Thousand Dollars.

Plaintiff further alleges, in paragraph 3 of his complaint that the defendant well knew that said appliance by which the plaintiff was injured was unsafe and dangerous, but that it wilfully and negligently neglected, omitted and refused to keep it in a state of repair or replace it with a safe and proper appliance, and thereby caused the injury to this plaintiff, as aforesaid.

Plaintiff further alleges, in paragraph 4 of his complaint, that he had no knowledge or means of finding out the condition of said iron bucket and the parts thereof, as aforesaid; that the light in the hold was dim and plaintiff could not see the bucket plainly; that he was then and now is a common laboring man, without knowledge of the mechanism of said bucket or its parts, and was by reason of his inexperience and the darkness unable to discover the defects in the said appliances; that it [366] was then the duty of the defendant to furnish the plaintiff a safe and proper bucket and appliance for use in said work, but that the defendant negligently and carelessly failed and refused to so furnish such safe and proper bucket and appliances for such work, or a well-lighted place to work in, whereby, because of the negligence and carelessness of the defendant, the plaintiff was so injured and crippled

and was so made to suffer great bodily pains and anguish and was so injured in a permanent way and caused to be and remain in the hospital and in his room, and rendered unable to work for a long time, whereby he lost his wages and paid large sums for support, all to the plaintiff's damage in the said sum of Ten Thousand Dollars.

Plaintiff further alleges, in paragraph 5 of his complaint, that at the time of his said injury as aforesaid, and prior thereto, he was a strong, healthy and vigorous laboring man of the age of 38 years, capable of and was earning six and one-half dollars a day, and had long engaged in said work and labor at first-class wages, but that on account of such injury, plaintiff's earning capacity was wholly destroyed for the period from the date of said injury to the date of signing the complaint in this case, on July 26, 1922, and was permanently reduced by one-half or more for life, all to his damage in the sum of Ten Thousand Dollars.

Plaintiff then asks for a judgment against the defendant in the sum of Ten Thousand Dollars and for his costs and disbursements in this action.

I.

In the first paragraph of defendant's amended answer, it [367] admits paragraph one of plaintiff's complaint; that is to say, that at all the times mentioned in the complaint and for a long time prior thereto the defendant was, and at all times since the injury complained of therein, has been and now is a corporation organized and existing under the laws of the State of Nevada, and was at

all such times and now is engaged in business as a common carrier of freight in the coastwise carrying trade in the waters of Alaska and within the jurisdiction of this Court.

In the second paragraph of its answer, defendant admits that on or about the 8th day of March, 1922, at Ketchikan, Alaska, plaintiff was employed by defendant as a stevedore or longshoreman in unloading coal from the steamship "Latouche," which vessel was then owned and being operated by defendant; but the defendant denies each and every other allegation contained in paragraph two of said complaint. The defendant also denies all of paragraphs three, four and five of said complaint.

And as a further, separate and first affirmative defense, the defendant alleges, first, that the defendant is now, and at all the times thereafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Nevada, and engaged in and authorized to engage in, the business of common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory; second; that on or about March 8, 1922, defendant employed plaintiff together with, and as a member of, a gang or crew of stevedores or longshoremen in the unloading and discharging of coal from the defendant's steamship "Latouche" onto a dock or wharf at the port of Ketchikan, Alaska; that all of said stevedores [368] and longshoremen, including plaintiff, were then and there of full age and experienced in the unloading and discharging of coal

from vessels onto docks and wharves at said port, and were then and there fellow-servants of each other and of plaintiff and engaged in the same common and general employment; that is, unloading and discharging coal from said vessel at said port, and were sufficient in numbers to perform said work, according to the customary and usual manner of performing the same, with safety to themselves and to plaintiff; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean; that is, Tongas Narrows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with coal tubs and other appliances, in a safe, substantial and seaworthy condition, necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that while so employed, plaintiff and two of his said fellow-servants, with plaintiff's acquiescence and assistance, all of whom then and there well knew that such was not the customary manner of performing said work and of the dangers likely to result therefrom, voluntarily, carelessly and negligently, and while aboard said vessel, sought to and did move a certain tub that was used to carry coal in and out of the hold of said vessel, by pulling said tub backwards instead of, as they then and there well knew was customary, proper and safe, moving said tub by pulling on the beekets with which for that purpose said tub was provided and by which said tub could have been safely moved,

and that said plaintiff and his said fellow-servants, by their pulling on said tub, did move [369] said tub backwards and caused the handle with which said tub was provided to fall towards them, and that plaintiff, in so negligently pulling said tub backwards, was struck by said handle as it so fell; and that said careless, voluntary and negligent acts aforesaid of the said plaintiff and of his said fellow-servants so committed by them, with knowledge and experience of the proper and safe manner of performing them and of the danger likely to result by performing them in the manner in which they did, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no case caused by the defendant.

And as a further, separate and second affirmative defense defendant alleges, first, that the defendant is now, and at all the times thereafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in, and authorized to engage in, the business of a common carrier in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory; second, that on or about March 8, 1922, the plaintiff being then and there a man of full age and experienced in the unloading and discharging of coal and freight from the vessels on to docks and wharves at the port of Ketchikan, Alaska, and knowing the dangers and risks incident and appurtenant to such

work and of work on and about steamships while unloading and discharging coal, was employed by defendant, together with and as a member of a gang or crew of stevedores or longshoremen who were then and there engaged in unloading coal from the [370] defendant's steamship "La-touche" at said port; that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean; that is, Tongass Narrows, in the Territory of Alaska, and was then and there made fast, by lines or ropes, to a certain dock or wharf that extended out into said waters, and was then and there fully equipped with safe, substantial and seaworthy coal tubs and other appliances and equipment necessary for and ordinarily used in said work and on and about steamships similar to said vessel; that said plaintiff, being so of full age and so experienced, entered upon said employment and knowingly assumed the risks and dangers incident thereto and thereafter, while aboard said steamship, voluntarily, carelessly and with gross negligence on his part, moved and assisted to move a certain coal tub with which plaintiff was then and there thoroughly conversant, and with which he had then and theretofore been doing said work without any complaint or objections to its condition, although he was then and there entirely familiar with such appliances and with the methods of their use, and which tub was used to carry coal in and out of the hold of said vessel, by pulling said tub backwards instead of, as

he then and there well knew was customary, proper and safe, moving and assisting to move said tub by pulling on the beekets with which, for that purpose, said tub was provided, and by which said tub could have been safely moved, and that plaintiff, by his said pulling and assisting to move said tub backwards, caused, as plaintiff then and there well knew, was likely to result, the handle with which the tub was provided to fall toward him; and plaintiff, being so negligently pulling said tub backwards, was struck by said handle as it was falling; [371] and that said careless, voluntary and negligent acts aforesaid of plaintiff, so committed by him with knowledge and experience of the proper and safe manner of performing them and of the risks and dangers incident thereto and after he had become thoroughly acquainted with and knew the exact condition of said tub and made no complaint or objection whatsoever as to its condition, were the direct and proximate cause of the injury, if any, sustained by plaintiff while in said employment, and that all of said acts as well as said injury, if any, were entirely beyond the control of and in no wise caused by defendant. And the defendant prays that plaintiff recover nothing by this action and that the defendant have judgment against plaintiff for its costs and disbursements herein incurred.

II.

For reply to the allegations in the first and second affirmative defenses in the defendant's answer, the plaintiff admits the allegations in paragraph

one of each of said defenses; that defendant is now, and at all times thereafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of Nevada and engaged in and authorized to engage in the business of a common carrier, in the Territory of Alaska, and that it has paid its annual corporation license tax last due to said Territory; and for reply to the second paragraph in the defendant's first and second affirmative defenses the plaintiff admits that on the 8th day of March, 1922, the plaintiff was employed by the defendant as a longshoreman in the unloading and discharging of coal from the defendant's steamship "Latouche" on to a dock or wharf at the port of Ketchikan, [372] Alaska; admits that at that time plaintiff was of the age of 38 years; admits that said vessel was then and there lying in the tidal and navigable waters of the North Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to the said dock and wharf by lines; admits that while at said work he was injured as alleged in his complaint herein and not otherwise, and denies each and every other allegation in said first and second affirmative defenses contained.

III.

You are instructed that this action is brought by the plaintiff against the defendant to recover against it a judgment for \$10,000 for injury to his person alleged to have been caused to the plaintiff while he was employed by the defendant and

engaged in unloading and discharging coal from the defendant's vessel the "Latouche," at Ketchikan, Alaska, on March 8, 1922, and which injury is alleged to have been caused by and through the negligence of the defendant company in failing to provide at the time and place for such work a reasonably safe place in which to work and reasonably safe and adequate appliances with which to perform the services required to be performed there, whereby, for the want of such reasonably safe place to work and reasonably safe and adequate appliances, the plaintiff was injured.

IV.

The defendant alleges that the place where the plaintiff claims to have been so injured was a reasonably safe place in which to work and the appliances so furnished with which to do such work were safe and adequate and sufficient, and that the injury, if any, was caused by the negligence of [373] the plaintiff and those engaged in assisting him in such work at the time of the alleged injury, and not by or through any fault or negligence of the defendant.

V.

The defendant also alleges that at the time and place of the alleged injury, the plaintiff was of full age and an experienced man in the performance of the work of so unloading and discharging such coal from the said vessel and knowingly assumed the risks and dangers incident thereto, and voluntarily and carelessly and with gross negli-

gence on his part, moved and assisted in moving the coal tub used in such work by pulling it backward instead of pulling with the beackets provided on the tub for that purpose on the other side, well knowing that the custom in such work was to pull said tub by the beackets, instead of pulling it backwards, whereby, from his own carelessness he was so injured, and not from any fault or carelessness of the defendant.

VII.

The Court instructs you that some of the alleged facts in the pleadings in this case are admitted by the parties and may, therefore, be accepted by you as established in the case. These admitted facts are, first, that at all the times mentioned in the pleadings herein and for a long time prior thereto, the defendant was, and at all the times since the injury complained of, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Nevada, and was at all such times and now is engaged in business as a common [374] carrier of freight in the coastwise carrying trade in the waters of Alaska and within the jurisdiction of the Court; and it is further admitted that on the eighth day of March, 1922, at Ketchikan, Alaska, the plaintiff was employed by the defendant as a stevedore or longshoreman, in unloading coal from the steamer "Latouche," which vessel was then owned and being operated by defendant.

It is also an admitted fact that on the eighth day of March, 1922, the plaintiff was employed

by the defendant as longshoreman in the unloading and discharging of coal from defendant's steamship "Latouche" and on to a dock or wharf at the port of Ketchikan, Alaska; that at that time plaintiff was of full age and that the said vessel was then and there lying in the tidal waters of the North Pacific Ocean, to wit, Tongass Narrows, in the Territory of Alaska, and was made fast to said dock or wharf by lines.

It is further admitted that while at said work, plaintiff was struck by the bail of the bucket falling.

These facts alleged on the one side and admitted on the other, must be accepted by you as established facts in the case, and, having been formally established by the pleadings, it will be your duty to treat them as facts without considering any evidence relative thereto. Your duty is to consider the testimony in this case with reference to facts alleged on the one side and denied on the other, which constitute the issues in the case. Your findings on these facts, taken together with the established facts and the law as given you in these instructions, are the basis upon which you should determine your verdict in this case. [375]

VII.

You are instructed that the defendant, the Alaska Steamship Company, admits in its answer in this case that the plaintiff herein was one of its employees engaged by it in unloading and discharging coal out of its steamship, the "Latouche," onto the dock or wharf at Ketchikan, Alaska, on

March 8, 1922, and also on that day and at all times since that day the said Alaska Steamship Company, defendant herein, was and now is a common carrier engaged in trade and commerce in the Territory of Alaska.

VIII.

You are instructed that every common carrier engaged in trade or commerce in the Territory of Alaska, shall be and is liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees or by reason of any defect or insufficiency due to its negligence in its cars, appliances and machinery; and you are also instructed that in all actions brought against any common carrier to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery by the employee where his contributory negligence was slight and that of the employer was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

IX.

You are further instructed that in this case the defendant, the Alaska Steamship Company, is liable to the plaintiff for all [376] damages which may have resulted to him from the negligence of the defendant or by reason of any defect or insufficiency due to its negligence in its appliances,

machinery, ways or works causing the injury to his person, if any, so alleged to have been received by him on March 8, 1922, while so employed by the defendant in unloading and discharging coal from defendant's steamship, the "Latouche," onto the wharf or dock at Ketchikan, Alaska.

X.

If you should find from the evidence, however, that the plaintiff was guilty of any contributory negligence in causing the injury complained of, you are instructed that such contributory negligence shall not bar a recovery by him in this case, where his contributory negligence was slight and that of the defendant was gross in comparison. If you should find that the plaintiff was guilty of contributory negligence at the time of the alleged injury, it would then be your duty to determine from the evidence in the case whether his contributory negligence was slight in comparison with that of the defendant, and to diminish the damages, if any, to be allowed to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and of the defendant, and to return a verdict accordingly.

XI.

You are instructed that no person shall recover damages from a common carrier under the laws in force in Alaska for personal injury to himself, where the injury was done by his own [377] consent, or was caused by his own negligence, without any negligence on the part of the defendant; but where the plaintiff and defendant are both at fault,

the plaintiff may still recover, provided he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee.

XII.

You are instructed that you cannot find a verdict for the plaintiff until it is proved to your satisfaction, by a fair preponderance of the evidence that the plaintiff was injured as alleged in his complaint and that the injury was caused by the negligence of defendant as alleged in the complaint.

XIII.

You are instructed that negligence is the failure to do something that a person of reasonable care and prudence would have done, or the doing of something that a person of reasonable care and prudence would not have done under the circumstances. It is want of due care in the particular situation. Due care and negligence are relative terms, and what in one situation might be due care might be negligence in another, and the measure of duty always is reasonable care and caution on the part of an employer for the safety of his employees, and that care should be proportioned always to the danger reasonably to be apprehended from the employment in which the servant is engaged.

XIV.

The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and co-operating [378] with the neg-

ligent act of a defendant, is the proximate cause of the injury. If you shall find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat recovery altogether, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence.

XV.

The statute under which this suit is brought makes the defendant liable to the plaintiff for all injuries suffered by the plaintiff because of its negligence, or that of any of its officers, agents or other employees. Therefore, as a matter of law, the negligence of any officer, agent or employee of the defendant, other than the negligence of the plaintiff himself, is the negligence of the defendant, for which it would be liable.

XVI.

..

The plaintiff in this case alleges that the injury he suffered, if any, was caused by the negligence of the defendant in failing to furnish a safe and

well-lighted place for him to work in, and safe appliances and equipment with which to work, [379] whereby he was injured.

On this branch of the case, the Court instructs you that an employer does not guarantee the absolute safety of the place where the employee works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employee to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant or employee does not undertake to incur the risks arising from the negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendant and its officers, agents and employees in charge of the work on the steamship "Latouche" at the time of the injury to plaintiff, resulting from the employment of the plaintiff as a laborer in such work, to exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find by a fair preponderance of the evidence that the plaintiff was so injured on the defendant's steamship "Latouche" on March 8, 1922, while so unloading and discharging coal therefrom, and that the place where he was required to work was dark and badly lighted, and that condition of the light prevented the plaintiff from dis-

covering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff. [380]

XVII.

The Court further instructs the jury that it was the duty of the defendant steamship company, its officers, agents and employees having charge of the work in which plaintiff was engaged when he was so injured, to furnish to the plaintiff who was in its employ, such tools, appliances, tubs and other instrumentalities as were reasonably safe for the purpose for which they were used; and the Court instructs the jury that if they believed from a fair preponderance of the evidence in this case, that the defendant steamship company or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which it knew to be defective, or which its officers, agents, or employees whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence the defendant or its officers, agents or employees superintending said work might have known to be defective and liable to drop the handle of the said iron bucket when so being used in said work, and that in consequence of said defect the plaintiff, while exercising ordinary care, was injured while in the performance of his duties, then the jury should find a verdict for the plaintiff.

XVIII.

You are further instructed that if you believe from the evidence in this case, that the iron tub or bucket used by the plaintiff at the time of receiving the injury complained of, was reasonably safe and suitable for the plaintiff to use in the performance of his duties, then its use was not a negligence of the defendant and plaintiff cannot recover because of its use. [381]

XIX.

One of the defenses in this case is that the plaintiff, being of full age and experienced in the work of unloading and discharging coal from a steamship on to a wharf or dock at Ketchikan, Alaska, assumed the risks of the employment and cannot recover for that reason.

On that branch of the case the jury are instructed that the plaintiff assumed only the risks of injury which were ordinarily incident to the employment in which he was engaged; and you are further instructed, in this connection, that by the use of the expression "a risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on the part of a steamship company operating as a common carrier, or its employees, this is not a risk ordinarily incident to the employment; and if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than

his own negligence, if any, this would not be a risk which he assumed as incident to his employment.

191½.

I instruct you that when an employee assumes the ordinary risks of employment, he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty, to provide suitable appliances and a safe place to work, and he does not assume any risk of the employer's negligence in performing such duty. However, where a defect is known to an employee or is so patent as to be readily observed by him, he [382] cannot continue to use the defective appliance in the face of knowledge and without objection without himself assuming the hazard incident to such situation. If a defect is so palpably observable that the servant may be presumed to know of its existence and he continues in the employer's employ without objection, he is said to have made his election to thus continue, notwithstanding the employer's neglect, and in such case he cannot recover.

XX.

You are instructed that if the plaintiff knew or was of such age, apparent intelligence and experience and maturity of judgment that he should have known of the danger incurred by him while working with the bucket in the defective condition testified to, if you believe from the evidence that the bucket so operated by the plaintiff was defective, he took upon himself and assumed all the patent and obvious risks incident to his employment; and if the danger and risk of the bails falling because of any

defect therein, while the bucket was being hauled by him in the hold of the vessel, was obvious and could have been readily observed by a person possessing average intelligence and judgment by the ordinary exercise of his senses, then the plaintiff assumed the risk thereof and cannot recover.

20½.

There is this difference between the defense of contributory negligence and that of assumption of risk. Contributory negligence is the omission of the employee to use those precautions for his own safety which ordinary prudence requires; while assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur [383] an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects.

The jury, in the cause of defense of contributory negligence, should compare the negligence of the parties, if any shown, and such defense is not a bar to plaintiff's recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages should be diminished by the jury in proportion to the amount of the employee's negligence.

If the jury, on the other hand, find that the plaintiff assumed the risk of his employment under the

instruction I have given you, then such finding would be a bar to plaintiff's recovery and your verdict should be for defendant.

XXI.

The jury is instructed that if you shall find a verdict for the plaintiff in this case, it will be your duty to assess the damages which he has sustained, not to exceed the sum of Ten Thousand Dollars demanded in his complaint. The damages, if any, in this case, cannot be exemplary; that is given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint [384] also the condition of his health and physical ability to labor, before the accident complained of, as compared with the present condition thereof and how far the injury is probably permanent in its character and results, as well as the mental and physical suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate result of the accident, not to exceed the amount demanded in the complaint.

XXII.

You are further instructed that you are the judges of the effect and value of all evidence ad-

dressed to you, except when it is declared by the Court in these instructions to be conclusive; but you are instructed that your power of judging the effect of evidence is not an arbitrary power but one to be exercised by you with legal discretion and in subordination to the rules of evidence and in accordance with these instructions.

You are instructed that you are not bound to find a verdict in this case in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

You are instructed that a witness wilfully false in one part of his testimony may be distrusted in others, and if you believe that any witness in this case has wilfully testified falsely in one part of his testimony, you may distrust him in other parts thereof and you should not find a verdict for either party based on such false testimony. [385]

XXIII.

You are further instructed that in civil cases, and this is a civil case, the affirmative of the issue shall be proved by the party alleging it, and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

XXIV.

You are further instructed that evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, you are instructed that if weaker

and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

XXV.

You are further instructed that you are the sole judges of the credibility of witnesses and of the weight that shall be given to their testimony. With that the Court has nothing to do. You may judge of the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, his means of knowledge as to any fact about which he testifies, his interest in the case, the feeling he may have for or against the parties to the action, or any circumstances tending to shed light upon the truth or falsity of such testimony; and it is for you at last to say what weight you will give to the testimony of any and all witnesses.

XXVI.

Finally, you are instructed that in deliberating upon a [386] verdict, you are not to be influenced by sympathy or by prejudice for or against either party to the action. Your verdict should be based upon the evidence admitted for your consideration and upon the law governing this case, as given to you by the Court. Any prejudice or sympathy or feeling for or against either party should be wholly disregarded and you should base your verdict upon the evidence and the instructions of the Court alone. You have no right to consider anything in this case except the evidence admitted

by the Court. Any evidence offered or questions asked, to which objections were sustained, you are not to consider for any purpose. Neither should you pay any attention to statements of attorneys in offers of testimony which were not admitted, or in arguments or otherwise, which are not based on founded upon the testimony admitted in the case.

XXVII.

I instruct you that the defendant company is not an insurer of the safety of its employees, and is only bound to use ordinary care to protect them from injury, and that in this case it was the duty of the plaintiff, while working on or about the steamship "Latouche," to use ordinary care to avoid injury to himself while engaged in said work.

XXVIII.

I instruct you that if you find from a preponderance of the evidence that the coal tub in question was old and in disrepair and that the trigger or catch holding the bail thereon in place was defective, and even if you should further find by a preponderance of the evidence that the defendant directed the plaintiff to use said coal tub and furnished said coal tub to [387] plaintiff for use in his work, yet you are further instructed that if you find from a preponderance of the evidence that the plaintiff at the time he used said tub knew its condition and the condition of the trigger and catch and bail thereon, and knew and appreciated the danger thereof, and you further believe that the danger was so imminent that an ordinarily prudent man would not incur it, but would refuse

to use said tub, then the plaintiff cannot recover in this action.

XXIX.

You are instructed that a servant, when he enters the service of an employer, impliedly agrees that he will assume the risks which are ordinarily and naturally incident to the particular service in which he engages, and if you believe from a preponderance of the evidence that the injury to the plaintiff was only the result of one of the risks ordinarily incident to the work in which he was engaged on board the vessel "Latouche," and not otherwise, then McHugh cannot recover in this case, and your verdict should be for the Alaska Steamship Company.

XXX.

You are instructed that it was the duty of the plaintiff McHugh in his work in unloading or assisting to unload coal from the vessel "Latouche," to exercise care to avoid injuries to himself. He was under as great obligation to provide for his own safety from such dangers as were known to him, or were discernible by ordinary care on his part, or were discernible by a proper examination thereof or were discernible by the use of his sight or other senses, as the Alaska Steamship Company was to provide for him. He must take ordinary care to [388] learn the dangers which are likely to beset him in such work. He must not go blindly to his work, where there is danger. He must inform himself.

XXI.

You are instructed that if you find that the coal tub used by McHugh was in a defective condition and that by reason thereof there was risk or danger in using or moving or pulling or shoving it about, and that such risk or danger was patent and obvious to McHugh and such as should have been ascertained by a proper examination thereof, or by the use of his sight and other senses, no notice of such, if any, defective condition of the tub would be required to be given to McHugh by the Alaska Steamship Company.

XXII.

I instruct you that the plaintiff McHugh in going to work upon the steamer "Latouche" assumed the ordinary risks incident to said work and that he continued to carry said assumption during his continuance in said work, even though the defendant the Alaska Steamship Company, was negligent in permitting such, if any, ordinary risks to exist, provided that said McHugh knew of said risks and *and* appreciated them, that is to say, provided that an ordinary man of the age and intelligence of McHugh, by the use of his sight and other natural senses would have known of and appreciated such risks. Actual knowledge of any particular ordinary risk is not required, but only that his experience, age and intelligence were such that he would know such risks existed and appreciate them.

This, gentlemen of the jury, concludes the instructions. You will be handed two forms of verdict—one finding in favor [389] of the plaintiff,

the other finding in favor of the defendant. If you should find a verdict in favor of the plaintiff, you will fill in the blank space in the form handed you, in favor of the plaintiff, by writing therein the amount of damages which you shall find for him, not exceeding in any case, the sum of Ten Thousand Dollars, and have the same signed by your foreman. If you should find for the defendant, your foreman should sign the proper verdict. You will then return the verdict you have unanimously agreed upon into Court as your verdict in this case.

Thereupon in open court and in the presence of the jury, the defendant took the following exceptions, which were allowed:

Mr. ROBERTSON.—We desire to except to the words “And commerce in the seventh instruction. We except to the 8th instruction, to the 9th, 10th, 11th, 14th, 15th, 16th, 17th, 19th, 21st, to the 21½—

The COURT (Interrupting.) That is 20½, I think.

Mr. ROBERTSON.—Yes; 20½ instead of 21½. And we desire also to except to the failure of the Court to give defendant’s requested instructions Nos. 1, 2, 3, 5, 6, 7, 8, 10, 12, 16 and 17. We also except to the failure to give defendant’s supplemental requested instructions Nos. 1, 3, 4, 5 and 6.

And thereupon the jury retired for the consideration of its verdict.

Filed in the District Court, Territory of Alaska, First Division. June 2, 1923. John H. Dunn, Clerk. By ———, Deputy. [390]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 566—KA.

BERNARD McHUGH,

Plaintiff,

vs.

THE ALASKA STEAMSHIP COMPANY, a
Corporation,

Defendant.

Judge's Certificate.

I hereby certify that I am the judge by and before whom the above-entitled cause was tried and that the foregoing bill of exceptions is a full, true and correct account and transcript of the evidence and proceedings had therein, and that it contains the evidence and all the evidence heard or considered at said trial except exhibits of defendant, the originals whereof are ordered forwarded with this transcript.

I also certify that the said bill of exceptions was duly presented and filed within the time allowed by law and the rules of this Court.

Wherefore, said bill of exceptions being true and correct, I do now, within the time allowed by law and the rules of this Court, allow and settle the same, and order it to be filed and to become a part of the records of this cause.

Dated at Ketchikan, Alaska, this 2d day of June, 1923.

THOS. M. REED,
United States District Judge. [391]

In the District Court of the United States for the
District of Alaska, Division Number One, at
Juneau.

No. 566-KA—(2212-A).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Order Re Original Exhibits.

Now on this day, the parties hereto by their respective counsel consenting thereto in open court and it appearing proper to the presiding judge of the above-entitled court that defendant's original exhibits should be inspected by the appellate court upon the writ of error heretofore issued herein;

Now, therefore, it is ordered that defendant's original exhibits herein be transported by the clerk of this court to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, California, so that said exhibits may be received and considered by said Honorable Court in connection with the tran-

script of the proceedings on the writ of error herein.

Done in open court this 2d day of June, 1923.

THOS. M. REED,

District Judge.

O. K.—WICKERSHAM & KEHOE,

Of Counsel for Plaintiff.

R. E. ROBERTSON,

Of Counsel for Defendant.

Filed in the District Court, Territory of Alaska,
First Division. Jun. 2, 1923. John H. Dunn,
Clerk. By ————, Deputy.

Entered Court Journal No. D, page 440. [392]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 566-KA—(2212-A).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the District Court, Ketchikan,
Alaska:

You will please make up a transcript of the
record in the above-entitled cause, and include
therein the following papers, to wit:

1. Complaint.
2. Amended answer.
3. Order of March 26, 1923, that reply to original answer stand as reply to amended answer.
4. Reply.
5. Verdict.
6. Judgment.
7. Assignment of errors.
8. Petition for writ of error.
9. Bond on writ of error.
10. Writ of error.
11. Citation on writ of error.
12. Bill of exceptions.
13. Order re original exhibits, dated June 2, 1923.
14. This praecipe.

Kindly prepare said transcript in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and forward it to said court in accordance with said rules.

R. E. ROBERTSON,
A. H. ZIEGLER,
Attorneys for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Jun. 2, 1923. Jno. H. Dunn, Clerk. By M. D. Morrissey, Deputy. [393]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 566-KA—(2212-A).

BERNARD McHUGH,

Plaintiff,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Defendant.

**Order Extending Time to and Including July 14,
1923, to File Record and Docket Cause.**

Now on this day, for good cause shown, on the motion of R. E. Rebertson, Esq., attorney for the Alaska Steamship Company, a corporation, plaintiff in error and the above-named defendant,

IT IS HEREBY ORDERED that the time within which said plaintiff in error shall file the record and docket this case with the Clerk of the United States Circuit Court of Appeals at San Francisco, California, shall be, and the same is hereby enlarged and extended to and including July 14, 1923.

Done in open court this 25th day of June, 1923.

THOS. M. REED,

District Judge.

Copy received June 25, 1923.

WICKERSHAM & KEHOE,

Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska,
First Division. Jun. 25, 1923. John H. Dunn,
Clerk. By M. B. King, Deputy.

Entered Court Journal No. S, page 191. [394]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

I, John H. Dunn, Clerk of the District Court
for the District of Alaska, Division No. 1, hereby
certify that the foregoing and hereto attached 394
pages of typewritten matter, numbered from One to
394, both inclusive, constitutes a full, true, and
complete copy, and the whole thereof, of the record,
as per praecipe of the plaintiff in error, on file
herein and made a part thereof, in the cause
wherein The Alaska Steamship Company, a Cor-
poration, is plaintiff in error, and Bernard Mc-
Hugh, is defendant in error, No. 566-KA—(2212-
A), as the same appears of record and on file in
my office, and that the said record is by virtue of
a writ of error and citation issued in this cause,
and the return thereof, in accordance therewith.

I do further certify that the transcript was pre-
pared by me in my office, and that the cost of
preparation, examination and certificate, amount-

ing to One Hundred Eighty-seven Dollars and Twenty Cents (\$187.20), has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 25th day of June, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

[Endorsed]: No. 4051. United States Circuit Court of Appeals for the Ninth Circuit. The Alaska Steamship Company, a Corporation, Plaintiff in Error, vs. Bernard McHugh, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1, at Juneau.

Filed July 5, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.